APPENDIX

FEB 28 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of
KNIGHT NEWSPAPERS, INC.,

Appellant,

vs.

PAT L. TORNILLO, JR.,

Appellee.

On Appeal from the Supreme Court of Florida

APPEAL DOdocketed NOVEMBER 19, 1973; JURISDICTION POSTPONED JANUARY 14, 1974

APPENDIX

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IN THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 72-20199

PAT L. TORNILLO, JR.,

Plaintiff,

vs.

THE MIAMI HERALD PUBLISHING COMPANY,
A DIVISION OF KNIGHT NEWSPAPERS, INC.,

Defendant.

COMPLAINT

The Plaintiff, by undersigned counsel, states:

1. Plaintiff is a candidate for public office in that he is seeking the nomination of the Democratic Party in District No. 103 for the Florida House of Representatives.

2. The Defendant publishes a newspaper known as the *Miami Herald*. Under the protections granted to it by the First and Fourteenth Amendments to the Constitution of the United States, the Defendant regularly comments upon candidates for public office.

3. The rights guaranteed to the Defendant by the First and Fourteenth Amendments to the Constitution of the United States are not absolute, and while given great priority in a democratic society, nevertheless must yield to compelling and subordinating state interests under Statutes narrowly drawn to protect these interests.

4. The government of this state has a duty to assure free and fair elections. To this end, it has enacted F.S. 97-104 ("The Florida Election Code") among the purposes of which is to protect the public from corrupt practices; and candidates from false or "hit and run" last minute charges or other attacks upon them by giving them an equal opportunity for reply.

5. The state has even regulated First Amendment freedoms of press, speech and association in limited fashion, by restricting the distribution of literature on election day if it be "against any candidate"; by restricting the distribution of literature near polling places. It has imposed *identification requirements* on political literature; it has limited the charges for political advertising; *and it has established a fairness doctrine under F.S. 104.38 whereby when any newspaper assails the personal character of any candidate for nomination, such newspaper shall upon request by such candidate publish any reply he may wish to make thereto in as conspicuous a place as the matter that calls for such reply.*

6. In brief, the Legislature by such statutes, has told the newspapers of this state that they cannot hide behind one amendment while assaulting the rights guaranteed under another.

7. On September 20, 1972, the Defendant assailed the personal character of the Plaintiff (See Exhibit #1).

8. On September 27, 1972, the Plaintiff requested from the Defendant the right to respond as set forth in F.S. 104.38. A copy of said reply is attached hereto as Exhibit #2. This request was refused.

9. On September 29, 1972, the Defendant again assailed the personal character of the Plaintiff (See Exhibit #3).

10. On September 30, 1972, the Plaintiff requested the statutory right to reply and a copy of said reply is attached hereto as Exhibit #4. Again the Defendant refused to publish such reply.

11. The Legislature in adopting F.S. 104.38, created a right in the assailed candidate, and a correlative duty in his newspaper assailant. The Plaintiff has demanded this right, and the Defendant, in willful violation of F.S. 104.38, has failed and refused to honor its obligations.

12. The second primary election is scheduled to be held on Tuesday, October 3, 1972. The attacks of the Defendant upon the Plaintiff have been deliberately made in close proximity to this election date in order to make it impossible for the Plaintiff to reply in an adequate fashion, therefore assuring to the Defendant that its campaign of vilification will result in the defeat of the Plaintiff.

13. The actions of the Defendant have been willful and malicious, and have been designed to injure the Plaintiff and materially reduce his chances for nomination.

14. The Plaintiff has neither the means nor the opportunity of responding to the attacks upon him by the Defendant save through the methods permitted by the Legislature in its adoption of F.S. 104.38.

15. Unless these statutory remedies are made available to him, the Plaintiff will suffer irreparable harm and

injury as a consequence of the willful, intentional, deliberate and malicious attacks of the Defendant upon him.

16. The Plaintiff seeks first a declaration of his rights under F.S. 104.38 pursuant to F.S. 86.01. Under this Statute, the Court may render declaratory judgments on the existence or nonexistence of any privilege or right of any person. In addition, the Plaintiff seeks injunctive relief, there being no adequate remedy at law to prevent the irreparable harm and injury being threatened to him. In addition, the Plaintiff seeks actual and punitive damages in excess of $5,000.

WHEREFORE, and by reason of the foregoing, the Plaintiff prays that this Court will grant a hearing on a short date; and declare the rights of the parties hereto under the facts as above set forth, and will temporarily and upon final hearing permanently, mandatorily enjoin the Defendant to publish the responses of the Plaintiff as set forth herein, and in the alternative and in addition, will enter judgment against the Defendant and in favor of the Plaintiff in excess of $5,000. Plaintiff further demands trial by jury on all issues triable by jury as a matter of right.

TOBIAS SIMON, P.A.
Attorney for Plaintiff
1492 South Miami Avenue
Miami, Florida 33130

By: /s/ Tobias Simon

(Certificate of Service omitted in printing.)

EXHIBIT #1 TO COMPLAINT

THE MIAMI HERALD

September 20, 1972

The State's Laws And Pat Tornillo

LOOK who's upholding the law!

Pat Tornillo, boss of the Classroom Teachers Association and candidate for the State Legislature in the Oct. 3 runoff election, has denounced his opponent as lacking "the knowledge to be a legislator, as evidenced by his failure to file a list of contributions to and expenditures of his campaign as required by law."

Czar Tornillo calls "violation of this law inexcusable."

This is the same Pat Tornillo who led the CTA strike from February 19 to March 11, 1968, against the school children and taxpayers of Dade County. Call it whatever you will, it was an illegal act against the public interest and clearly prohibited by the statutes.

We cannot say it would be illegal but certainly it would be inexcusable of the voters if they sent Pat Tornillo to Tallahassee to occupy the seat for District 103 in the House of Representatives.

EXHIBIT #2 TO COMPLAINT

September 27, 1972

FROM: PAT L. TORNILLO, JR.
CTA Executive Director
1809 Brickell Avenue
Miami, Florida 33129

Legislative Candidate, District 103

TO: MIAMI HERALD
One Herald Plaza
Miami, Florida

Pat Tornillo And The CTA Record

Five years ago, the teachers participated in a statewide walkout to protest deteriorating educational conditions.

Financing was inadequate then and we now face a financial crisis.

The Herald told us that what we did was illegal and that we should use legal processes instead. We are doing just that through legal and political action.

My candidacy is an integral part of this process. During the past four years:

— CTA brought suit to give Dade County its share of state money to relieve local taxpayers.

— CTA won a suit which gave public employees the right to collectively bargain.

— CTA won a suit which allowed the School Board to raise $7.8 million to air-condition schools and is helping to keep this money.

Unfortunately, the Herald dwells on past history and ignores CTA's totally legal efforts of the past four years.

We are proud of our record.

EXHIBIT #3 TO COMPLAINT

THE MIAMI HERALD

September 29, 1972

FROM the people who brought you this—the teacher strike of '68—come now instructions on how to vote for responsible government, i.e., against Crutcher Harrison and Ethel Beckham, for Pat Tornillo. The tracts and blurbs and bumper stickers pile up daily in teachers' school mailboxes amidst continuing pouts that the School Board should be delivering all this at your expense. The screeds say the strike is not an issue. We say maybe it wouldn't be were it not a part of a continuation of disregard of any and all laws the CTA might find aggravating. Whether in defiance of zoning laws at CTA Towers, contracts and laws during the strike, or more recently state prohibitions against soliciting campaign funds amongst teachers, CTA says fie and try and sue us—what's good for CTA is good for CTA and that is natural law. Tornillo's law, maybe. For years now he has been kicking the public shin to call attention to his shakedown statesmanship. He and whichever acerbic prexy is in alleged office have always felt their private ventures so chock-full of public weal that we should leap at the chance to nab the tab, be it half the Glorious Leader's salary or the dues checkoff or anything else except perhaps mileage on the staff hydrofoil. Give him public office, says Pat, and he will no doubt live by the Golden Rule. Our translation reads that as more gold and more rule.

EXHIBIT #4 TO COMPLAINT

FROM: Pat L. Tornillo, Jr.,
CTA Executive Director,
and Candidate (Dem.) for
State Rep., Dist. 103
1809 Brickell Avenue
Miami, Florida 33129
Phone: 854-0220

September 30, 1972

EDITORIAL REPLY

Since the *Herald* has chosen to publicly attack my record, accomplishments, and positions on various issues, and those of the CTA, I again request that under Florida Statute 104.38, the *Herald* print the following record of affirmative and legal action.

In 1968, CTA signed a no-strike affidavit.

In 1969, CTA filed and won a suit in the Supreme Court of Florida, which gives all public employees the right to bargain collectively without the right to strike.

In 1971, CTA filed the Tornillo suit, which enabled the School Board to receive $7.6 million and are presently cooperating with the Board in their effort to retain this money and avoid further financial chaos.

Since 1968, CTA has reimbursed the taxpayers of Dade County for the full salary and all fringe benefits of its president.

Since 1970, CTA has not used the school mail service to communicate with its members.

Since 1970, CTA has paid all costs of payroll deduction of dues for its members.

We have attempted to obey all the laws of the state, not intentionally violating any, while continuing our efforts to alert the public to the impending financial crisis facing the schools.

We have, however, also retained our belief in the right of public employees to engage in political activity and to support the candidates of our choice, as is the right of any citizen in this great country of ours.

Aye, there's the rub.

* * * *

TORNILLO v. MIAMI HERALD PUBLISHING CO.

No. 72-20199.

Circuit Court, Dade County.

October 20, 1972.

38 Fla. Supp. 80

Final judgment: Plaintiff, a candidate for the state legislature, demanded that the Miami Herald print verbatim his replies to two editorials in the Herald relating to his candidacy for public office. The Herald refused.

Plaintiff then brought this action for a mandatory injunction and for damages seeking to enforce §104.38, Florida Statutes, by a civil action. The editorials and plaintiff's replies are attached to the complaint. In view of the nature of the relief requested the court granted plaintiff's request for an emergency hearing on October 2, 1972.

Pursuant to §86.091, Florida Statutes, the attorney general was advised that the defendant intended to ask the court for a declaration that §104.38 was unconstitutional. The attorney general was served with a copy of the complaint and was represented at the hearing.

§104.38 is a criminal statute. Absent special circumstances equity will not enjoin the commission of a crime. Pompano Horse Club Co. v. State (1927), 93 Fla. 415, 111 So. 801, 52 A.L.R. 51; 17 Florida Jurisprudence, *Injunctions*, §46.

However, there is a more serious infirmity in plaintiff's case. The court is of the opinion that §104.38 violates Article I, §§4 and 9 of the Florida Constitution and the Fourteenth Amendment to the U.S. Constitution.

This question was considered in State v. News-Journal Corporation, 36 Fla. Supp. 164, a case filed in the county judge's court of Volusia County, Florida. In a carefully reasoned opinion dated February 14, 1972, Judge J. Robert Durden held §104.38 unconstitutional on two grounds—an infringement upon freedom of the press, and a denial of due process of law because the statute is too vague, indefinite and uncertain to constitute notice of what language may fall within its purview and what constitutes a reply which must be printed. The attorney general advised the court that he had elected not to appeal Judge Durden's decision on the ground that he also had the same reservations about the constitutionality of the statute.

This court concurs in Judge Durden's opinion. State statutes prohibiting or directing any type of publication, particularly upon pain of criminal sanction, are presumed unconstitutional unless it can be demonstrated that the infringement can be justified as required to protect a substantial public interest threatened by a clear and present danger. Near v. Minnesota, 283 U.S. 697 (1931); Thomas v. Collins, 323 U.S. 516, 530 (1945); Palko v. Connecticut, 302 U.S. 319, 327 (1937). The "priority" given First Amendment freedoms "gives these liberties a sanctity and a sanction not permitting dubious intrusions." Thomas v. Collins, supra, at page 530. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963). The First

Amendment prohibits the government from restraining the publication even of top secret documents alleged to be vital to the national security. New York Times Co. v. United States, 403 U.S. 713 (1971).

Clearly if the state may not prohibit what a newspaper may print it cannot assume the editorial function and direct a newspaper what to print. By the First Amendment, "The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government." New York Times Co. v. United States, supra at page 717 (Justice Black concurring) (1971).

Since §104.38, Florida Statutes, so clearly reaches cases in which its restraint upon freedom of speech and press does not measure up to any permissible First Amendment standard the statute is void on its face.

Because of its broad intrusion into the area protected by the First Amendment, §104.38 also suffers from an additional infirmity—it is impermissibly vague and indefinite and this vagueness serves to restrict and stifle protected expression. No editor could know from the statute exactly what words would offend the statute or the scope of the reply intended to be mandated. A state may not enact such a broad statute and leave it to the courts, on a case by case basis, to determine the constitutionality of its application to various circumstances. To do so places a citizen in an untenable position of foregoing his protected liberties, or risking criminal prosecution. This dilemma itself

impermissibly restricts free expression. Smith v. Cahoon, 283 U.S. 564 (1931).

> "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." Ashton v. Kentucky, 384 U.S. 195, 200 (1966).

The strict standards of overbreadth and vagueness in First Amendment cases are even stricter where a statute provides criminal sanctions. "The standard for certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanctions for enforcement." Winters v. New York, supra at page 515.

The attorney general advised the court at the bearing (sic) that his opinion as to the unconstitutionality of this statute had not changed since State v. News-Journal Corporation, supra, and therefore he did not elect to intervene to defend the statute.

Plaintiff stated that if the court found the statute on which this suit is based unconstitutional he did not desire to take further proceedings in this court and requested that his suit be dismissed with prejudice.

Accordingly, confirming the court's oral ruling made at the conclusion of the hearing, this cause is dismissed with prejudice at plaintiff's cost.

Pat L. TORNILLO, Jr., Appellant,

v.

The MIAMI HERALD PUBLISHING COMPANY, a Division of Knight Newspapers, Inc., Appellee.

No. 43009.

Supreme Court of Florida.

July 18, 1973.

Rehearing Denied Oct. 10, 1973.

287 So. 2d 78

PER CURIAM

This cause is before us upon direct appeal from Circuit Court of Dade County, holding Florida Statute 104.38,[1] F.S.A., unconstitutional thereby vesting jurisdiction in this Court under Article V, Section 3(b)(1), Florida Constitution, as amended 1973, F.S.A.

[1]F.S. §104.38 — Newspaper assailing candidate in an election; space for reply — If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083.

Appellant Tornillo, plaintiff below, who was a candidate for the State Legislature demanded that appellee print verbatim his replies to two editorials printed therein attacking appellant's personal character. The appellee refused and Tornillo filed complaint for declaratory and injunctive relief and punitive damages. Pursuant to Florida Statute 86.091, F.S.A., the Attorney General of this State was advised that appellant intended to contest the constitutionality vel non of Florida Statute 104.38, F.S.A. In view of the circumstances, the trial court granted the request for an emergency hearing.

Preliminarily, the trial court determined that the statutory provision in question is a criminal statute and that absent special circumstances, equity will not ordinarily enjoin commission of a crime. Pompano Horse Club Co. v. State, 93 Fla. 415, 111 So. 801 (1927). Notwithstanding this infirmity in appellant's complaint, the trial court further concluded that F.S. §104.38, F.S.A., is violative of Article I, Sections 4 and 9 of the Constitution of Florida and the Fourteenth Amendment to the Constitution of the United States as a restraint upon freedom of speech and press and because it is impermissibly vague and indefinite.

Believing that the promulgation of this statute is authorized by Article IV, Section 4.[2] and the First[3] and Fourteenth Amendments to the Constitution of the United

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[2]Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion; and On Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

[3]Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; . . .

States, and Article VI, Section 1,[4] and Article I, Section 4[5] of the Florida Constitution, and believing that this statute enhances rather than abridges freedom of speech and press protected by the First Amendment, we hold that it does not constitute a violation of the First and Fourteenth Amendments to the Constitution of the United States or Article I, Section 4, Florida Constitution.

The election of leaders of our government by a majority of the qualified electors is the fundamental precept upon which our system of government is based, and is an integral part of our nation's history. Recognizing that there is a right to publish without prior governmental restraint,[6] we also emphasize that there is a correlative responsibility that the public be fully informed.

The entire concept of freedom of expression as seen by our founding fathers rests upon the necessity for a fully informed electorate. James Madison wrote that, "A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy; or, perhaps both. Knowledge will forever govern ignorance;

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[4]Section 1. Regulation of elections. — All elections by the people shall be by direct and secret vote. General elections shall be determined by a plurality of votes cast. Registration and elections shall, and political party functions may, be regulated by law.

[5]Section 4. Freedom of speech and press. — Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.

[6]Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357; New York Times v. United States, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822; Martin v. City of Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313; Lamont v. Postmaster General, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398.

and a people who mean to be their own governors, must arm themselves with the power which knowledge gives (to W. T. Barry, August 4, 1822)."[7]

The public "*need to know*" is most critical during an election campaign. By enactment of the first comprehensive corrupt practices act relating to primary elections in 1909 our legislature responded to the need for insuring free and fair elections. Article III, Section 26, and Article VI, Section 9, Constitution of Florida 1885, commanded the Legislature to pass laws "regulating elections and prohibiting under adequate penalties, all undue influence thereof from power, bribery, tumult or other improper practices" and to "enact such laws as will preserve the purity of the ballot given under this Constitution." This act of 1909 did not deal with the subject of the wrongful use of newspapers or other printed or written matter, with the exception of a provision which declared it to be a misdemeanor for any candidate or other person to have or distribute on day of primary at or near any polling place any writing against any candidate in the primary. Florida Statute 104.38, F.S.A., was originally enacted in 1913 as Chapter 6470, Section 12, Laws of Florida, 1913.[8] This second act

[7]6 Writings of James Madison 398 (Hunt Ed. 1906), The Complete Madison 337 (1953).

[8]Chapter 6470, Section 12 (Laws of Florida, 1913), provided, "That if any newspaper in its columns assails the personal character of any candidate for nomination in a primary election, or charges such candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall, upon request of such candidate, immediately publish free of cost any reply he may make thereto, in as conspicuous a place and in the same kind of type as the matter that calls for such reply; provided, such reply does not take up more space than the matter replied to. A person who fails to comply with the provisions of this Section, shall upon conviction be punished by fine not exceeding five hundred dollars, or by imprisonment." See subsequent history of stat-

adopted in 1913 known as the corrupt practices act was enacted to supplement the act of 1909. The statutory provision, the constitutionality vel non which is being questioned in the instant cause, was enacted not to punish, coerce or censor the press but rather as a part of a centuries old legislative task of *maintaining conditions conducive to free and fair elections.* The Legislature in 1913 decided that owners of the printing press had already achieved such political clout that when they engaged in character assailings, the victim's electoral chances were unduly and improperly diminished. To assure fairness in campaigns, the assailed candidate had to be provided an equivalent opportunity to respond; otherwise not only the candidate would be hurt *but also* the people would be deprived of both sides of the controversy.[9]

What some segments of the press seem to lose sight of is that the First Amendment guarantee is "not for the

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ute, Section 5927, Revised General Statutes of Florida, 1920, entitled newspaper assailing candidate must give free space for reply. This provision was re-enacted as Section 875.40, Florida Statutes, which varies only slightly from the present law. Section 875.40, Florida Statutes was identical to Chapter 6470, Section 12 (Laws of Florida, 1913). In 1951, the Legislature renumbered and slightly revised this provision to cover any elections (not just primaries) and to provide that, "Any one failing to comply with the provisions of the section shall, upon conviction, be guilty of a misdemeanor." Chapter 268.70, Laws of Florida, 1951. Section 104.38 was entitled, "Newspaper assailing candidate in election; space for reply." See also Chapter 28151, General Laws, 1953, which adds the words "or for election" so that the preliminary portion of the statute reads: "If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election. . . ." In 1972, HB 2801 attempting to repeal F.S. 104.38 died in committee.

[9]Ex Parte Hawthorne, 116 Fla. 608, 156 So. 619 (1934). 9 Florida L.J. 297 (1935), "Brief History of the Corrupt Practices Act of Florida," J. V. Keen.

benefit of the press so much as for the benefit of us all."[10] Speech concerning public affairs is more than self expression. It is the essence of self government.[11]

Mr. Justice Learned Hand expressed the role of the press well when he emphasized,

> "However neither exclusively, nor even primarily are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: The dissemination of news from as many different sources and with as many different facets and colors as possible."[12]

In Pennekamp v. Florida, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946), the Supreme Court of the United States emphasized that the power of the press must be tempered with responsibility when it explained,

> "Without a free press there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society. The scope and nature of the constitutional protection of freedom of speech must be viewed in that light and in that light applied. * * * "A free press is vital to a democratic society because its freedom gives it power. Power in a democracy implies responsibility in its exercise.

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[10]Time, Inc. v. Hill, 385 U.S. 374, 389, 87 S.Ct. 534, 543, 17 L.Ed.2d 456.

[11]Garrison v. Louisiana, 379 U.S. 64, 74-75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964).

[12]United States v. Associated Press, 52 F.Supp. 362, 372.

No institution in a democracy, either governmental or private, can have absolute power. Nor can the limits of power which enforce responsibility be finally determined by the limited power itself. . . . In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise. Most State constitutions expressly provide for liability for abuse of the press's freedom. That there was such legal liability was so taken for granted by the framers of the First Amendment that it was not spelled out. Responsibility for its abuse was embedded in the law. The First Amendment safeguarded that right.

"The press does have the right, which is its professional function, to criticize and to advocate. The whole gamut of public affairs is the domain for fearless and critical comment, and not the least the administration of justice. But the public function which belongs to the press makes it an obligation of honor to exercise this function only with the fullest sense of responsibility. Without such a lively sense of responsibility a free press may readily become a powerful instrument of injustice." [Emphasis Supplied]

The concept which appears throughout the decisions underlying First Amendment guarantees that there is a broad societal interest in the free flow of information to the public by the Supreme Court of the United States was explicitly stated in New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), as well as other Supreme Court decisions, as follows:

> "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Roth vs. United States, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498, 1506. 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the republic, is a fundamental principle of the constitutional system.' "

The statute here under consideration is designed to add to the flow of information and ideas and does not constitute an incursion upon First Amendment rights or a prior restraint, since no *specified newspaper content is excluded.* There is nothing prohibited but rather it requires, in the interest of full and fair discussion, additional information.

The right of the public to know all sides of a controversy and from such information to be able to make an enlightened choice is being jeopardized by the growing concentration of the ownership of the mass media into fewer and fewer hands, resulting ultimately in a form of private censorship. Through consolidation, syndication, acquisition of radio and television stations and the demise of vast numbers of newspapers, competition is rapidly vanishing and news corporations are acquiring monopolistic influence over huge areas of the country. We take note of a recent

article in Florida Trend magazine, March 1973, explicating that the Miami Herald is the largest newspaper published in Florida, that it is larger in size than the next two largest newspapers; and that it is not only a large city daily newspaper but also is a regional and international newspaper.

Freedom of expression was retained by the people through the First Amendment *for all the people* and *not merely for a select few*. The First Amendment *did not create a privileged class* which through a monopoly of instruments of the newspaper industry would be able to *deny to the people the freedom of expression* which the First Amendment guarantees. The Supreme Court of the United States in Associated Press v. United States, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013, clearly expounded,

> "It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints

upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity."

More recently, in Red Lion Broadcasting Co. v. F.C.C., 127 U.S.App.D.C. 129, 381 F.2d 908, affirmed 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969), the Supreme Court opined,

"Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public. Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all.

> 'Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.' Associated Press v. United States, 326 U.S. 1, 20, 65 S.Ct. 1416, 1425, 89 L.Ed. 2013 (1945)."

By this tendency toward monopolization, the voice of the press tends to become exclusive in its observation and its wisdom which in turn deprives the public of their right to know both sides of controversial matters.

Appellant urges that if a newspaper may attack a candidate with impunity and he is provided no right to reply, the public interest in free expression suffers, because they can only hear the publisher's side of the controversy and are denied the dissenting view.

Although we have carefully considered appellee's argument that Red Lion Broadcasting Co. v. F.C.C., supra, is inapplicable to the present cause, we cannot discount certain excerpts therefrom which are applicable to First Amendment guarantees in general. Therein, the Supreme Court explained that,

> "Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication." 395 U.S. at 401, n. 28, 89 S.Ct. at 812.

That Court further stated in Red Lion Broadcasting v. F.C.C., supra, 395 U.S., at 390, 89 S.Ct. 1794, in Associated Press v. U.S., supra, 326 U.S., at 20, 65 S.Ct. 1416, and New York Times v. Sullivan, supra, 376 U.S. at 270, 84 S.Ct. 710, that it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas wherein truth will prevail rather than to countenance a monopolization of that market whether by government or private enterprise.

Florida's right of reply statute is consistent with the First Amendment as applied to this State through the Fourteenth Amendment. In Rosenbloom v. Metromedia, 403 U.S. 29, 47, 91 S.Ct. 1811, 29 L.Ed.2d 296, we find that the Supreme Court of the United States is inclined to this position by the following quote from the majority opinion:

> "Furthermore, in First Amendment terms, the cure seems far worse than the disease. If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern."

To this comment, the Court appended the following note:

> "Some States have adopted retraction statutes or right-of-reply statutes. See Donnelly, The Right of Reply: An Alternative to an Action for Libel, 34 Va. L.Rev. 867 (1948); Note, Vindication of the Reputation of a Public Official, 80 Harv. L.Rev. 1730 (1967). Cf. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969).

> "One writer, in arguing that the First Amendment itself should be read to guarantee a right of access to the media not limited to a right to respond to defamatory falsehoods, has suggested several ways the law might encourage public discussion. Barron, Access to the Press — A New First Amendment Right, 80 Har. L. Rev. 1641, 1666-1678 (1967). It is important to recognize that the private individual often desires press exposure either for himself, his ideas, or his causes. Constitutional adjudication must take into account the individual's interest in access to the press as well as the individual's interest in preserving his reputation, even though libel actions by their nature encourage a narrow view of the individual's interest since they focus only on situations where the individual has been harmed by undesired press attention. A constitutional rule that deters the press from covering the ideas or activities of the private individual thus conceives the individual's interest too narrowly."

Although appellee attempts to minimize the import of the aforestated quotation, we feel compelled to note that such remarks regarding right to reply legislation is (sic) entirely consistent with past precedent establishing the fundamental purpose of the First Amendment to inform the people.

Neither appellant nor appellee takes issue with the holding of the trial court that it lacked jurisdiction to enjoin an alleged violation of Florida Statute 104.38, F.S.A. This provision is criminal in nature and absent special cir-

cumstances equity will usually not enjoin commission of a crime.[13]

Appellant urges that the Right of Reply Statute in question is neither impermissibly vague nor unnecessarily broad. We must agree and therefore uphold the constitutionality of this statutory provision. It is a fundamental principle that this Court has the duty, if reasonably possible, consistent with protection of constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality and if reasonably possible a statute should be construed so as not to conflict with the constitution.[14] Courts are inclined to adopt that reasonable interpretation of a statute which removes it farthest from constitutional infirmity. In Gitlow v. People of New York, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138, the Supreme Court of the United States stated every presumption is to be indulged in favor of the validity of a statute, and the case is to be considered in the light of the principle that the State is primarily the judge of regulations in the interest of public safety and welfare.

We do not believe that Florida's statutory right of reply is lacking in any of the required standards of preciseness. The statute is sufficiently explicit to inform those

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[13]Pompano Horse Club Co. v. State, supra, 17 Fla. Jur. Injunctions, §46.

[14]Buck v. Gibbs, D.C., 34 F.Supp. 510, Mod. 313 U.S. 387, 61 S.Ct. 962, 85 L.Ed. 1416 (1940); Hunter v. Owens, 80 Fla. 812, 86 So. 839 (1920); Cragin v. Ocean & Lake Realty Co., 101 Fla. 1324, 133 So. 569, 135 So. 795 (1931), appeal dism. 286 U.S. 523, 52 S.Ct. 494, 76 L.Ed. 1267; Haworth v. Chapman, 113 Fla. 591, 152 So. 663 (1933); Hanson v. State, 56 So.2d 129 (Fla.1952); Overstreet v. Blum, 227 So.2d 197 (Fla.1969); Hancock v. Sapp, 225 So.2d 411 (Fla.1969); Rich v. Ryals, 212 So.2d 641 (Fla.1968).

who are subject to it as to what conduct on their part will render them liable to its penalties.

We recognize that certainty is all the more essential when vagueness might induce individuals to forego their rights of speech, press and association for fear of violating an unclear law. Scull v. Virginia, 359 U.S. 344, 79 S.Ct. 838, 3 L.Ed.2d 865 (1959), Ashton v. Kentucky, 384 U.S. 195, 86 S.Ct. 1407, 16 L.Ed.2d 469 (1965).

In Brock v. Hardie, 114 Fla. 670, 154 So. 690, 694 (1934), relative to the issue of vagueness, this Court said:

> "Whether the words of the Florida statute are sufficiently explicit to inform those who are subject to its provisions what conduct on their part will render them liable to its penalties is the test by which the statute must stand or fall, because, as was stated in the opinion above mentioned, 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'
>
> "Such seems to be the test approved by the Supreme Court of the United States. Citation of authorities as to what may be considered the exact meaning of the phrase 'so vague that men of common intelligence must necessarily guess at its meaning,' so that certain conduct may be considered within or outside the true meaning of that phrase, or what language of a statute may lie within or without it, would be of little aid to us.

> "We must apply our own knowledge with which observation and experience have supplied us in determining whether words employed by the statute are reasonably clear or nor (sic) in indicating the legislative purpose, so that a person who may be liable to the penalties of the act may know that he is within its provisions or not."

Inter alia, appellee attacks the constitutionality of the statute on grounds of vagueness and overbreadth because of the use of the term "any"—referring to the type of reply allowable. This statute provides in part,

> "if any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost *any reply* he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply. . . ." [Emphasis Supplied]

Because of the longstanding policy of this Court to give a statute, if reasonably possible, a construction supporting its constitutionality, we hold that the mandate of the statute refers to "any reply" which is wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane.

We conclude that the statute in question is as certain and definite as others heretofore upheld as constitutionally permissible. The following statement made by Judge Tamm in Red Lion Broadcasting Co. v. F.C.C., supra, 381 F.2d at 921, is clearly applicable to the instant cause: "Here there is no broad-reaching, all-embracive statutory provision penalizing knowing as well as unknowing conduct."

Although apparently not raised before the trial court, the brief of Amicus Times Publishing Co. has raised the issue that Florida Statute 104.38, F.S.A., is a deprivation of property right without due process. With this contention, we can not agree. Florida Statute 104.38, F.S.A., is a valid exercise of the state police power enacted to assure the integrity of the electoral process. In Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928), the Supreme Court stated,

> "And where the public interest is involved preferment of that interest over the property interest of the individual, to extent even of its destruction, is one of the distinguishing characteristics of every exercise of police power which affects property." Id. at 279, 280, 48 S.Ct. at 247.

We find this argument of deprivation of property rights by being required to furnish free space to be without merit. See Miller v. Schoene, supra; Marsh v. Alabama, 326 U.S. 501, at 506, 66 S.Ct. 276, 90 L.Ed. 265; Red Lion Broadcasting v .F.C.C., supra; Rosenbloom v. Metromedia, supra; Chronicle Publishing Co. v. Attorney General, 94 N.H. 148, 48 A.2d 478 (1946); Amalgamated Food Employees v. Logan Valley Plaza, Inc., 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968).

In conclusion, we do not find that the operation of the statute would interfere with freedom of the press as guaranteed by the Florida Constitution and the Constitution of the United States. Indeed it strengthens the concept in that it presents both views leaving the reader the freedom to reach his own conclusion. This decision will encourage rather than impede the wide open and robust dissemination of ideas and counterthought which the concept of free press both fosters and protects and which is essential to intelligent self government.

Newspapers are not wholly dependent on electronic media as were the broadcasters in Red Lion Broadcasting Co. v. F. C. C., supra. However, we have no difficulty in taking judicial notice that the publishers of newspapers in this contemporary era would perish without this vital source of communications. The dissemination of news other than purely local is transmitted over telegraph wires or over air waves. This not only includes dissemination of news but also in chain newspaper operations so prevalent today, the Miami Herald being one; even editorials are prepared in one place and transmitted electronically to another. Therefore, the principles of law enunciated in Red Lion Broadcasting Co. v. F. C. C., supra, have been taken into consideration in reaching our opinion.

A half free press would be deceptive to the public. Florida Statute 104.38, F.S.A., in the interest of all the people, provides that candidates for public office under certain prescribed circumstances shall have a right of reply, a right of expression. It does not deny to the owner of the instruments of the newspaper industry any right of expression. The statute *assures*, and *does not abridge*, the right of expression which the First Amendment guaran-

tees. The statute supports the freedom of the press in its true meaning—that is, the right of the reader to the whole story, rather than half of it—and without which the reader would be "blacked out" as to the other side of the controversy.

For the foregoing reasons, we find Florida Statute 104.38, F.S.A., to be constitutional and reverse the holding of the trial court that it is unconstitutional.

Accordingly, the judgment of the trial court is reversed and this cause is remanded to the trial court for further proceedings not inconsistent herewith.

It is so ordered.

CARLTON, C. J., ADKINS, McCAIN and DEKLE, JJ., and RAWLS, District Court Judge, concur.

ROBERTS, J., concurs specially with Opinion in which CARLTON, C. J., ADKINS, McCAIN and DEKLE, J.J., and RAWLS, District Court Judge, concur.

I concur in the opinion and judgment of the majority. We are fully cognizant of the recent decision rendered by the Supreme Court of the United States in Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 1772, decided May 29, 1973, which holds that neither the Federal Communications Act nor the First Amendment require broadcasters to accept paid political advertisements. But this opinion in no way derogated the earlier opinion of that court in Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969), validat-

ing the fairness doctrine of the Federal Communications Commission which imposes two affirmative responsibilities on the broadcaster—coverage of issues must be adequate and must fairly reflect differing viewpoints. As the Supreme Court stated in *Columbia Broadcasting*, supra, "In fulfilling its Fairness Doctrine obligations, the broadcaster must provide free time for the presentation of opposing views if a paid sponsor is unavailable, . . . and must initiate programming on public issues if no one else seeks to do so. See John J. Dempsey, 6 P & F Radio Reg. 615 (1950); Red Lion, supra, 395 U.S., at 378, 89 S.Ct. 1800."

The complaints filed in *Columbia Broadcasting*, supra, by the Democratic National Committee and the Business Executives Move for Vietnam Peace, alleged that a broadcaster had violated the First Amendment by refusing to sell it time to broadcast spot announcements expressing political views of the different groups. The Supreme Court turned its decision primarily on the limited nature of the broadcasting airwaves and the existence of the Fairness Doctrine which requires broadcasters to provide free time for presentation of opposing political views when a paid sponsor is not available. The decision in Columbia Broadcasting is directed solely to the peculiar and limited nature of broadcasting frequencies, and that decision is not applicable to the instant facts presently before this Court in the case sub judice. Chief Justice Burger commences the body of his opinion with the following remarks:

> "Mr. Justice White's opinion for the Court in Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969), makes clear that the broadcast media pose

unique and special problems not present in the traditional free speech case. Unlike other media, broadcasting is subject to an inherent physical limitation. Broadcast frequencies are a scarce resource; they must be portioned out among applicants. All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated. The Court spoke to this reality when, in Red Lion, we said 'it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.' Red Lion, supra, 395 U.S., at 388, 89 S.Ct., at 1806.

"Because the broadcast media utilize a valuable and limited public resource, there is also present an unusual order of First Amendment values. Red Lion discussed at length the application of the First Amendment to the broadcast media. In analyzing the broadcasters' claim that the Fairness Doctrine and two of its component rules violated their freedom of expression, we held that '[n]o one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because "the public interest" requires it "is not a denial of free speech."' Red Lion, supra, 395 U.S., at 389, 89 S.Ct., at 1806. Although the broadcaster is not without protection under the First Amendment, United States v. Paramount Pictures, Inc., 334 U.S. 131, 166, 68 S.Ct. 915, 933, 92 L.Ed. 1260 (1948), '[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . .

> It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.' Red Lion, supra, 395 U.S., at 390, 89 S.Ct., at 1806."

After recounting the history of broadcast regulations, the court in *Columbia Broadcasting*, supra, opined that broadcasters are charged with the duty of providing the listening and viewing public with access to a balanced presentation of information on issues of public importance. The Supreme Court was particularly concerned with forcing broadcasters to accept paid political advertisements when broadcasting frequencies are so limited because of a substantial risk that such a system would be monopolized by those who could and would pay the costs, and that a system so heavily weighted in favor of the financially affluent or those with access to wealth would in effect undermine the effective operation of the Fairness Doctrine. The views of the affluent would prevail since they would have it within their power to purchase time more frequently, and editorial advertising could then be monopolized by those of one political persuasion. Those were the concerns of the Supreme Court in *Columbia Broadcasting*, supra, when it rendered its decision that broadcasters are not required to accept paid editorial advertisements regardless of the content thereof.

Our opinion in the instant cause in no way conflicts with the recent decision of the Supreme Court in *Columbia Broadcasting*, supra.

CARLTON, C.J., ADKINS, McCAIN and DEKLE, JJ., and RAWLS, District Court Judge, Concur

BOYD, Justice, Dissenting:

I respectfully dissent.

This statute carries a penalty provision for violations thereof, and it therefore must be most strictly construed in favor of any person accused thereunder. The statute is so vague on its face as to raise doubts in the minds of those reading it as to the exact underlying legislative intent.

There are no standards as to when a publisher must carry a reply. For example, the following are just some of the important questions left unanswered by this statute. Does the law include both news stories and editorial comment? If a story mentions a "situation", but does not mention the candidate by name, may he reply? When the publisher knows his statements are true, must he publish a statement from the candidate which he knows to be false? If the reply of the candidate libels other persons, must the publisher print it, and, if so, is the publisher subject to liability for any resulting libel suit? If the candidate's reply were to contain obscene language, would the publisher still have to print it—and thereby invite prosecution under our obscenity laws?

The First Amendment to the Constitution of the United States provides that, "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." Article I, Section 4 of the Constitution of the State of Florida similarly provides: "No law shall be passed to restrain or abridge the liberty of speech or of the press." Since these constitutional provisions prohibit the government from limiting the right of the publishing press to publish news and comment editorially, it would

be equally unconstitutional for the government to compel a publisher to print a statement of any other person, or persons, against that publisher's will.

The majority opinion correctly observes that freedom of speech and freedom of the press carry the duty to speak the truth. And, of course, the constitutional rights of freedom of speech and freedom of the press must be exercised with appropriate regard to the provisions of our libel and obscenity statutes. As in all other areas of public and private service, some errors will, from time to time, surely occur. Yet, recognizing that the survival of a free press is contingent upon the press fulfilling its duty to the general public, the overwhelming majority of those in the publishing press comply with the highest of ethical standards.

We are taught in the Bible that, "the truth will make you free".[1]

Free people can make proper decisions for their own self-government only when they are adequately informed by a free press. To the extent that government limits or adds to that which a publisher must distribute, freedom of speech and freedom of the press are thereby diminished.

Almost everyone whose name has been carried frequently in the news media has been offended, at one time or another, by stories or comments with which he disagrees. This is part of the price one pays for success and notoriety. If there exists a problem in this state of affairs, the muzzling of a free press is not the solution to such problem.

I therefore dissent.

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[1]John 8:32.

ON PETITION FOR REHEARING

PER CURIAM

Appellee, Miami Herald, by petition for rehearing strenuously argues that this Court's opinion overlooks the fact that §104.38, Florida Statutes, F.S.A., is a criminal statute and that this Court is without power to rewrite or perform plastic surgery on a criminal statute in an attempt to cure the statute's vagueness by writing a definition of "reply". Appellee then journeys upon numerous hypothetical inquiries—What is a newspaper? What is an assault? What is an equally "conspicuous place"?—and then reasons that these "obvious ambiguities" render the subject statute so vague that same must be held unconstitutional.

As was emphatically stated in the opinion of this Court, the action underlying this cause before us is a civil action which was filed in the Circuit Court for the Eleventh Judicial Circuit seeking to require appellee to publish appellant's reply pursuant to Florida Statute 104.38, F.S.A., and for damages. No criminal penalty is sought in the case sub judice, and, therefore, the validity vel non of the criminal penalty is not here involved. We are not unmindful of the line of decisions from this Court and the Supreme Court of the United States requiring more specificity in statutory authorship to support a statute which imposes a criminal penalty. However, the language of our opinion clearly defines what would constitute a wrongdoing. We take this opportunity to restate the following excerpt from our opinion:

> "It is a fundamental principle that this Court has the duty, if reasonably possible, consistent with protection of constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality and if reasonably possible a statute should be construed so as not to conflict with the constitution.[1] Courts are inclined to adopt that reasonable interpretation of a statute which removes it farthest from constitutional infirmity. In Gitlow v. People of New York, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138, the Supreme Court of the United States stated every presumption is to be indulged in favor of the validity of a statute, and the case is to be considered in the light of the principle that the State is primarily the judge of regulations in the interest of public safety and welfare."

Even had this Court found the statute, the constitutionality vel non which is being questioned sub judice, not to be sufficiently definite and specific to support a criminal penalty, this criminal penalty provision would not be fatal to the statute because the statute is so constructed that the criminal penalty can be easily severed and deleted and still leave a complete legislative expression establishing a civil right to damages. This Court has long held that

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[1]Buck v. Gibbs, D.C., 34 F.Supp. 510, mod. Watson v. Back, 313 U.S. 387, 61 S.Ct. 962, 85 L.Ed. 1416 (1940); Hunter v. Owens, 80 Fla. 812, 86 So. 839 (1920); Cragin v. Ocean & Lake Realty Co., 101 Fla. 1324, 133 So. 569, 101 Fla. 1324, 135 So. 795 (1931), appeal dism., 286 U.S. 523, 72 S.Ct. 494, 76 L.Ed. 1267; Haworth v. Chapmen, 113 Fla. 591, 152 So. 663 (1933); Hanson v. State, 56 So.2d 129 (Fla. 1952); Overstreet v. Blum, 227 So.2d 197 (Fla. 1969); Hancock v. Sapp, 225 So.2d 411 (Fla.1969); Rich v. Ryals, 212 So.2d 641 (Fla.1968).

where certain clauses, provisions, or sections of a statutory enactment are in violation of constitutional mandates, it does not necessarily follow that the whole enactment should fail, and this Court has held that the Court may sever the unconstitutional provision and uphold the remainder if that which is left is complete in itself, sensible, and capable of being executed, whether or not the enactment contains a severability clause. State ex rel. Boyd v. Deal, 24 Fla. 293, 4 So. 899 (1888); Gwynn v. Hardee, 92 Fla. 543, 110 So. 343 (1926); Louis K. Liggett Co. v. Lee, 109 Fla. 477, 147 So. 463, 149 So. 8 (1933); City of Daytona Beach v. Harvey, 48 So.2d 924 (Fla.1950); Youngblood v. Darby, 58 So.2d 315 (Fla.1952); Harris v. Bryan, 89 So.2d 601 (Fla.1956); Cramp v. Board of Public Instruction of Orange County, 137 So.2d 828 (Fla.1962); Davis v. State, 146 So.2d 892 (Fla.1962); Musleh v. Marion County, 200 So.2d 168 (Fla.1967); Small v. Sun Oil Company, 222 So. 2d 196 (Fla.1969). In State v. Newell, 85 So.2d 124 (Fla. 1956), this Court opined:

> "We have held that it is not always necessary to declare an entire Act invalid where a portion thereof is unconstitutional simply because the Act does not contain a severability clause. State v. Calhoun County, 126 Fla. 376, 170 So. 883, 886, and cases therein cited. The test is whether this court can say that the Legislature would not have enacted the law under scrutiny except for the provision which is herein held unconstitutional and invalid."

A comparable statute to Florida Statute 104.38, F.S.A., requiring a full and fair correction, apology, and retraction to be published in the same editions or corresponding issues

of the periodical in which said article appeared, and in as conspicuous place and type as was said original article,[2] as an abatement of the publisher's liability for punitive damages, was held constitutional by this Court in Ross v. Gore, 48 So.2d 412 (Fla. 1950). Courts have generally regarded this type of statute to be in aid of a free press. We take judicial notice that this statute has been frequently used to avoid punitive damages apparently with no adverse effect to newspaper publishers. But, indeed, this statute has been utilized to their financial advantage.

We also here note another retraction statute promulgated by the Florida Legislature which defines a procedure for abatement of criminal penalty. Florida Statute 836.08, F.S.A., provides:

> "Correction, apology, or retraction by newspaper. —If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which

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[2]Florida Statute 770.02, F.S.A., provides:

"If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case shall recover only actual damages."

said article appeared, and in as conspicuous place and type as was said original article, then any criminal proceeding charging libel based on an article so retracted, shall be discontinued and barred."

Reverting to the hypothetical inquiries posed by appellee, it is observed that similar questions might well be posed as to the vagueness of certain provisions of Florida Statute 770.02, F.S.A., viz: "good faith"; "falsity"; "a full and fair correction"; "apology"; "conspicuous place"; and Florida Statute 836.08, F.S.A., viz: "correction"; "apology"; "reasonable grounds"; or "a full and fair correction". In short, the definition and meaning of specific words or phrases in a particular factual situation have been and will be an infinite subject of inquiry so long as Homo sapiens engage in the art of communication. At this stage of the instant controversy, we are confronted not with the wisdom of the Legislature in enacting the challenged statutory provision; our task is to preserve the prerogative of the legislative body unless it clearly contravenes the basic federal and state charters adopted by our citizenry.

In conclusion, it must be remembered that First Amendment Freedom of the Press is for the benefit of *all* the people and not just those who have invested money in the publishing business.

The petition for rehearing is denied.

CARLTON, C.J., ROBERTS, ADKINS, McCAIN and DEKLE, JJ., and RAWLS, District Court Judge, Concur

BOYD, J., Dissents

IN THE SUPREME COURT OF FLORIDA

CASE NO. 43,009

PAT L. TORNILLO, JR.,

Appellant,

vs.

THE MIAMI HERALD PUBLISHING COMPANY,
a Division of Knight Newspapers, Inc.,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The Miami Herald Publishing Company, a division of Knight Newspapers, Inc., Appellee in this case, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Florida upholding the constitutionality of Section 104.38, Florida Statutes, which was entered in this action on July 18, 1973 and adhered to upon Petition for Rehearing on October 10, 1973.

This Appeal is taken pursuant to 28 U.S.C. §1257(2).

PAUL & THOMPSON

/s/ Dan Paul

Dan Paul

/s/ James W. Beasley, Jr.

James W. Beasley, Jr.
Counsel for Appellee

(Certificate of Service omitted in printing)

FLORIDA STATUTES

The Florida Election Code

97.021 Definitions

The following words and phrases when used in this code shall be construed:

(1) "Primary election" means election held preceding the general election, for the purpose of nominating a party nominee to be voted for in the general election to fill a national, state or county office. The first primary is a nomination or elimination election, the second primary is a nominating election only.

(2) "Special primary election" is a special called nomination election designated by the governor, for the purpose of nominating a party nominee to be voted on in a general or special general election.

(3) "General election" means an election held on the first Tuesday after the first Monday in November in the even numbered years, for the purpose of filling national, state and county offices and for voting on constitutional amendments as proposed by the legislature.

(4) "Special general election" is a special called election for the purpose of voting on a party nominee to fill a vacancy in the national, state or county office.

* * * *

(18) "Candidate" shall mean any person who has filed his qualification papers, and paid his qualifying fees as required by law.

104.38 Newspaper assailing candidate in an election; space for reply

If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.803.

Civil Actions for Libel

770.02 Correction, apology, or retraction by newspaper

If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case shall recover only actual damages.

Crimes

775.082 Penalties for felonies and misdemeanors

* * * *

(5) A person who has been convicted of a designated misdemeanor may be sentenced as follows:

(a) For a misdemeanor of the first degree, by a definite term of imprisonment in the county jail not exceeding 1 year;

(b) For a misdemeanor of the second degree, by a definite term of imprisonment in the county jail not exceeding 60 days.

(6) Nothing in this section shall be construed to alter the operation of any statute of this state authorizing a trial court, in its discretion, to impose a sentence of imprisonment for an indeterminate period within minimum and maximum limits as provided by law.

775.083 Fine in lieu of or in addition to other criminal penalty

A person who has been convicted of a crime, other than a capital felony, may be sentenced, when specifically designated by statute, to pay a fine in lieu of or in addition to any punishment described in § 775.082. Fines for designated crimes shall not exceed:

(1) $10,000, when the conviction is of a felony of the first or second degree;

(2) $5,000, when the conviction is of a felony of the third degree;

(3) $1,000, when the conviction is of a misdemeanor of the first degree;

(4) $500, when the conviction is of a misdemeanor of the second degree;

(5) Any higher amount equal to double the pecuniary gain derived from the offense by the offender or double the pecuniary loss suffered by the victim.

(6) Any higher amount specifically authorized by statute.

STATE v. NEWS-JOURNAL CORPORATION.

Docket 64, Page 2438.

County Judge's Court, Volusia County.

February 14, 1972.

36 Fla.Supp. 164

ROBERT DURDEN, County Judge.

This cause came on to be heard on defendant's motion to dismiss on January 21, 1972. At said hearing, the court received a stipulated statement of facts and heard argument by the Volusia County Prosecutor and counsel for defendant.

Stipulated facts

The News-Journal Corporation is a Florida Corporation which publishes the Daytona Beach Morning Journal, a daily newspaper published in Volusia County. On September 29, 1971, there was published in the Daytona Beach Morning Journal a political article written by the News-Journal political editor, Ray Ruester, entitled *Kane's City Hall Power Grab*. The subject of the article was the incumbent mayor, Richard Kane, and his alleged attempts to create a strong mayor government for the city which, by charter, has a commission manager form of government.

By a letter dated September 29, 1971, addressed to the editor, News-Journal Corporation, Richard Kane re-

quested that pursuant to §104.38, Florida Statutes, the News-Journal Corporation immediately publish a reply to the column. The material which Mayor Kane sought to have published as his reply was attached to his letter to the editor and consisted of an article written by Richard Kane and previously published in the Halifax Reporter, a newspaper published in Volusia County, on September 4, 1971.

The News-Journal Corporation refused to publish the material as requested. Mayor Kane thereafter signed an affidavit and caused a warrant to be issued for the News-Journal Corporation for violation of §104.38, Florida Statutes.

The News-Journal Corporation filed its motion to dismiss contending, inter alia, that §104.38 is unconstitutional under article 1, §4, of the constitution of Florida, and the first and fourteenth amendments to the constitution of the United States.

Decision

§104.38, Florida Statutes, provides as follows—

> If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of costs any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that

> calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall, upon conviction, be guilty of a misdemeanor.

The defendant in its motion to dismiss contends that the above-quoted statute is unconstitutional. This court agrees with the defendant for the reasons as stated herein.

First, this court recognizes that the intent of the above-quoted statute is to regulate the press which is protected by the first amendment to the United States Constitution and article 1, §4, of the Florida Constitution. The cases limiting restraint of the free press are numerous. The case of the New York Times Company v. Sullivan, 376 U.S. 254 (1964), is recognized as one of the landmark decisions in dealing with the question of freedom of the press. Mr. Justice Brennan, rendering the opinion of the court in that case, stated —

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484, 1 L.ed. 2d 1498, 1506, 77 S.Ct. 1304. The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential

to the security of the republic, is a fundamental principle of the constitutional system.

Applying the rule of law as set forth therein it is the opinion of this court that the statute in question imposes an unconstitutional infringement upon the freedom of the press.

Second, it should be recognized that the statute in question is a criminal statute, the violation of which is punishable by fine or imprisonment. It is a well settled rule of law of this state, and of all other states, that a criminal statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. Cramp v. Board of Public Instruction of Orange County, Florida, 368 U.S. 278; Aztec Motel, Inc. v. State, ex rel. Faircloth, 251 So.2d 849 (Florida Supreme Court, 1971); Burstyn, Inc. v. Wilson, 343 495 (1951).

This court is of the opinion that the language of the statute in question is too vague, indefinite and uncertain to constitute notice of what language may fall within the purview of the statute and what constitutes a reply which must be printed at the request of candidates. This court is of the opinion that this statute is not reasonably definite and certain and that the constitutional requirement of definiteness is violated in that this statute fails to give a person of ordinary intelligence fair notice of its violation.

Moreover, it is the opinion of this court that the requirement of statutory definiteness must be even more

strictly enforced where First Amendment freedoms are involved. Ashton v. Kentucky, 384 U.S. 195; Scull v. Commonwealth of Virginia, 359 U.S. 344, NAACP v. Button, 371 U.S. 415. In the *Button* case the United States Supreme Court stated—

> Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity . . . The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.

In the opinion of this court, it takes little imagination to foresee the susceptibility of "sweeping and improper application" of the statute in question.

In declaring §104.38, Florida Statutes, to be unconstitutional, this court is not unmindful of the fairness doctrine as it is applied to radio and television through the regulations of the Federal Communications Commission. However, this court recognizes the distinction between the limited airwaves, which constitute a part of the public domain, and newspapers. Redlion Broadcasting

Company v. FCC, 395 U.S. 367 (1969); Yablonski v. United Mine Workers of America, 305 Fed. Supp. 868 (1969).

This is not to say that this court, by declaring this statute unconstitutional, condones the unbridled use of the press for character assassination of public officials. This court would urge the Florida legislature to consider the passage of proper legislation, keeping in mind the constitutional prohibitions against infringement upon the free press, which would encourage responsible news coverage and discourage the irresponsible use of the press for personal attacks upon the character of public officials.

Based on the foregoing, §104.38, Florida Statutes, is declared to be unconstitutional and, for that reason the charges placed against the defendant pursuant to the terms of said statute are dismissed.

Supreme Court of the United States

No. 73-797

The Miami Herald Publishing Company,
a Division of Knight Newspapers, Inc.,

Appellant,

v.

Pat L. Tornillo, Jr.

APPEAL from the Supreme Court of the State of Florida.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

January 14, 1974

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in the
Supreme Court
of the
United States

OCTOBER TERM, 1973

NO. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of
KNIGHT NEWSPAPERS, INC.,
Appellant,

v.

PAT L. TORNILLO, JR.,
Appellee.

On Appeal from the Supreme Court of Florida

JURISDICTIONAL STATEMENT

Appellant The Miami Herald Publishing Company, a division of Knight Newspapers, Inc. (*"The Miami Herald"*) appeals from the judgment of the Supreme Court of Florida entered on July 18, 1973, rehearing denied October 10, 1973, which reversed a decision of the Circuit Court of

Dade County, Florida and upheld the constitutionality of Section 104.38, Florida Statutes. This Jurisdictional Statement is submitted to show that the Supreme Court has jurisdiction of this Appeal and that substantial constitutional questions are presented which merit review by this Court.

OPINION BELOW

The initial opinion of the Florida Supreme Court dated July 18, 1973 and the opinion denying rehearing dated October 10, 1973 are not yet reported. The opinion of the Circuit Court of Dade County is reported at 38 Fla. Supp. 80 (1973). Copies of these three opinions are included in the Appendix to this Statement.

JURISDICTION

This action was brought by Appellee Pat L. Tornillo, Jr. ("Tornillo") against *The Miami Herald* for a mandatory injunction directing *The Miami Herald* to print verbatim a statement by Appellee and for damages based upon an alleged violation of Section 104.38, Florida Statutes, a criminal statute. On October 20, 1972, the Circuit Court for Dade County dismissed the Complaint, holding Section 104.38, Florida Statutes, to be in violation of the First and Fourteenth Amendments to the United States Constitution, and Article I of the Florida Constitution. Tornillo appealed directly to the Florida Supreme Court on November 3, 1972, and that Court reversed the decision of the Circuit Court and upheld the constitutionality of Section 104.38, Florida Statutes, in an opinion dated July 18, 1973. *The Miami Herald* filed a Petition for Rehearing, which was denied by the Supreme Court of Florida on October 10, 1973. *The Miami Herald* filed a

Notice of Appeal on November 1, 1973. A copy of the Notice of Appeal is included in the Appendix to this Statement. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, U.S.C., Section 1257(2). Although the Supreme Court of Florida remanded this case to the trial court for further proceedings, the opinion and judgment of the Florida Supreme Court are final for purposes of 28 U.S.C. §1257(2). The Florida Supreme Court conclusively decided the controlling constitutional issue, and its decision, which is binding upon the trial court, is therefore reviewable by this Court. *Mills v. Alabama*, 384 U.S. 214 (1966); *Hudson Distributors v. Lilly & Co.*, 377 U.S. 386 (1964); *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963).

QUESTION PRESENTED

Does Section 104.38, Florida Statutes, abridge freedom of the press and due process of law in violation of the First and Fourteenth Amendments to the United States Constitution by compelling a newspaper to provide free space, under criminal sanctions, to a candidate in any state election to reply to any publication in the newspaper which "assails [his] personal character," or charges him with "malfeasance or misfeasance" in office, or "otherwise attacks his official record"?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The Fourteenth Amendment to the United States Constitution provides, in part:

> ". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

The principal statute involved in this case is Section 104.38, Florida Statutes, which is part of the Florida Election Code:

> "§104.38 Newspaper assailing candidate in an election; space for reply. — If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083."

Sections 775.082 (5) and (6) and 775.083, which provide criminal sanctions for violations of §104.38, Fla. Stat., are reproduced in the Appendix to this Statement, together with Sections 97.021(1)-(4) and (18), which define the terms "election" and "candidate", as used in Section 104.38. No other terms contained in Section 104.38 are defined in the Florida Election Code.

Section 770.02, Fla. Stat., is a retraction statute which limits a plaintiff in a libel action to actual damages where, upon plaintiff's request, the publisher of the alleged defamatory statement prints a retraction. This Statute is also in the Appendix to this Statement.

STATEMENT OF THE CASE

In the fall of 1972, Tornillo was a candidate for the Democratic Party nomination for a seat in the Florida House of Representatives. On September 20, 1972 and September 29, 1972, *The Miami Herald* published editorials relating to Tornillo's candidacy. Copies of these editorials appear in the Appendix to this Statement.

On September 30, 1972, Tornillo requested *The Miami Herald* to print verbatim and free of cost a statement submitted by Tornillo, purportedly in reply to the editorials pursuant to Section 104.38, Florida Statutes. *The Miami Herald* did not print the material submitted by Tornillo. Tornillo did not request a retraction pursuant to §770.02, Fla. Stat., or otherwise claim that the editorials were libelous, untrue, or inaccurate.

On October 1, 1972, Tornillo filed a civil action in the Circuit Court for the Eleventh Judicial Circuit seeking to require *The Miami Herald* to publish his "reply," and to obtain damages. Circuit Judge Francis J. Christie held an emergency hearing on the matter on October 2, 1972. The Attorney General was notified of the suit pursuant to §86.091, Fla. Stat., requiring notice of any action in which a statute is alleged to be unconstitutional, and was represented at the hearing.

At the hearing, the Court was advised that the Attorney General had refused to appeal a decision by Volusia County Judge J. Robert Durden which had held §104.38 unconstitutional, because the Attorney General himself had reservations about the constitutionality of the statute. That case, *State v. News-Journal*, 36 Fla. Supp. 164 (Volusia County, Fla., Judges Ct. 1972) was apparently the first case brought under §104.38 since its enactment in 1913. A copy of the opinion in that case is contained in the Appendix to this Statement. The Attorney General advised Judge Christie that his opinion was unchanged since the *News-Journal* case, and that he continued to have doubts as the constitutionality of §104.38, and therefore would not defend the statute.

At the conclusion of the hearing, Judge Christie ordered Tornillo's case dismissed with prejudice, holding the statute void on its face as an impermissible restriction upon freedom of speech and press in violation of the First and Fourteenth Amendments to the Constitution of the United States and, in addition, denied due process of law under the Fourteenth Amendment because of its vagueness and ambiguity.

Tornillo appealed the judgment of the Circuit Court directly to the Supreme Court of Florida. The Attorney General of Florida filed a brief urging affirmance of the Circuit Court's decision. Amicus curiae briefs urging affirmance of the Circuit Court's judgment were also filed by the American Civil Liberties Union of Florida, Inc. and Times Publishing Company, publisher of two daily newspapers, the *St. Petersburg Times* and the *St. Petersburg Independent*. Donald U. Sessions, an attorney acting on his own behalf, filed an amicus curiae brief urging reversal.

On July 10, 1973, the Supreme Court of Florida rendered an Opinion, *per curiam*, which reversed the Circuit Court and upheld the validity of §104.38, Fla. Stat., finding that the statute did not violate the Constitutions of the United States or of Florida. One Justice dissented. On August 2, 1973, *The Miami Herald* filed a Petition for Rehearing. Twenty-two Florida newspaper publishers filed amicus curiae briefs urging the Court to grant the Petition and reverse its initial decision. The Attorney General of Florida filed a second Brief advancing similar views.

The Petition for Rehearing was denied in a *per curiam* opinion dated October 10, 1973, one Justice again dissenting. On November 1, 1973, *The Miami Herald* filed a Notice of Appeal to the Supreme Court of the United States.

THE QUESTIONS ARE SUBSTANTIAL

Introduction

This appeal involves the constitutionality of a novel form of governmental regulation of the press which is ostensibly designed to promote fairness in elections, but which in fact represents a severe restraint upon the exercise of journalistic discretion by putting the government in the editor's chair. In essence, the Florida statute in question conditions a newspaper's right to print editorials, news stories, advertising, or any other matter bearing unfavorably upon political candidates by requiring that if such matter is printed, the newspaper must offer the

candidates free space for a "reply." Violations of the statute are punishable as misdemeanors of the first degree. The Florida Supreme Court has also held that the statute may be invoked as the basis for a private action for mandatory injunction and damages.

The issues presented by this case have fundamental and far-reaching implications. Tornillo has asserted that the Florida statute is not only consistent with the First Amendment, but essential to providing him and others similarly situated with a means of publicly expressing their political views. Tornillo has sought to bring himself within the ambit of the Federal Communications Act's fairness doctrine and the personal attack rules of the Federal Communications Commission, urging that these doctrines can and should be applied to newspapers.

By contrast, *The Miami Herald's* position below and before this Court is that the "right of reply" statute represents an abridgement of a basic and vital constitutional protection provided to the press by the First Amendment. By its terms, the statute imposes governmental controls on editorial decisions to publish critical stories about political candidates. Such controls directly threaten journalistic integrity and weaken freedom of expression. The *per curiam* decision of the Supreme Court of Florida upholding the reply statute is thus in fundamental and irreconcilable conflict with the principles underlying this Court's decision in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, ____ U.S. ____, 36 L.Ed.2d 772 (1973) and the decisions of other courts. Governmental regulation of the content of newspapers by requiring publication, in the absence of compelling state

interests, is no less an unconstitutional restraint than governmental prohibition upon publication. The attempted analogy between newspapers and telecommunications media, if upheld, would eradicate the long recognized distinction between permissible regulation of print media and the electronic media. Censorship of newspapers in the guise of promoting fairness by requiring a right of "reply" or "access" is, nevertheless, censorship. As such, it is the exact opposite of the freedom of speech and press guaranteed by the First Amendment.

Even assuming that a State might legislate some form of access to the press without violating the guarantees of freedom of expression provided in the First Amendment, the Florida criminal statute at issue in this case is inconsistent both with the First Amendment guarantees of a free press and the due process rights in the Fourteenth Amendment, because the statute is excessively broad, vague, and ambiguous. The Florida Supreme Court attempted to cure some of the more obvious constitutional defects in the statute through interpretation, but the effort simply revealed more clearly the vices of the statute.

A. The Florida Statute which Requires the Press to Publish a Reply as a condition to Publishing Matter Critical of Political Candidates Violates the First Amendment

1. *The Decision below is in conflict with the rationale of prior cases.*

This Court has never ruled directly upon a state statute requiring newspaper publication of a "reply." The

fundamental question is whether the editorial discretion of newspapers may be constitutionally circumscribed by governmental regulation which compels publication. In *Columbia Broadcasting System*, this Court held that a broadcaster may not be forced to accept paid political advertising, concluding that governmental intrusion upon the exercise of "journalistic discretion" to determine what should or should not be published contravenes the "rigid limitations" of the First Amendment. Similarly, other federal courts, including three Circuit Courts of Appeal, have uniformly rejected any notion that the First Amendment permits the adoption of governmental regulation which compels a newspaper to publish material against its will.

The arguments advanced by Tornillo in the proceedings below were essentially similar to those made and rejected in *Chicago Joint Board, Amal. Cloth. Workers v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970). In that case, the newspaper refused to publish advertisements submitted to it by the union, which presented the union's views on a labor dispute in which it was engaged.

> "It is urged that the privilege of First Amendment protection afforded a newspaper carries with it a reciprocal obligation to serve as a public forum, and if a newspaper accepts any editorial advertising it must publish all lawful editorial advertisements tendered to it for publication at its established rates. We do not understand this to be the concept of freedom of the press recognized in the First Amendment. The First Amendment guarantees of free expression, oral or printed, exist for all . . . The Union's right to free speech

> does not give it the right to make use of the defendants' printing presses and distribution systems without defendants' consent." *Id.* at 478.

The union's petition for certiorari was denied. 402 U.S. 973 (1971).

The constitutional issues involved in an attempt to compel a newspaper to publish were also squarely faced by the Ninth Circuit Court of Appeals in *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971). In that case, a movie distributor claimed that its First Amendment rights were violated by the newspaper's refusal to accept certain proffered advertising without modifications requested by the newspaper. The Ninth Circuit firmly dismissed the would-be advertiser's claim of infringement of First Amendment rights.

> "Appellant has not convinced us that the Courts or any other governmental agency should dictate the contents of a newspaper." *Id.* at 135 (footnote om.).

A similar result was reached in *Avins v. Rutgers, State University of New Jersey*, 385 F.2d 151 (3rd Cir. 1967). The plaintiff in that case sought to compel the Rutgers Law Review to publish an article which it had previously rejected. The Third Circuit Court of Appeals affirmed the District Court's decision, refusing to order publication even in a state-supported publication.

> "The right to freedom of speech does not open every avenue to one who desires to use a particu-

> lar outlet for expression . . . Nor does freedom of speech comprehend the right to speak on any subject at any time . . . [Plaintiff] does not have the right, constitutional or otherwise, to commandeer the press and columns of the Rutgers Law Review for the publication of his article, at the expense of the subscribers to the Review and the New Jersey taxpayers, to the exclusion of other articles deemed by the editors to be more suitable for publication. On the contrary, the acceptance or rejection of articles submitted for publication in a law school law review necessarily involves the exercise of editorial judgment and this is in no wise lessened by the fact that the law review is supported, at least in part by the State." *Id.* at 153-54.

Accord, Resident Participation of Denver, Inc. v. Love, 322 F.Supp 1100 (D.Col. 1971).*

While the precise form of governmental regulation at issue here may differ from that involved in *Columbia Broadcasting System* and the cases discussed above, the

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*Without resorting to constitutional grounds, numerous other cases have rejected the concept that a newspaper should be considered to be a "public utility" compelled to accept and publish all advertising proffered to it. *E.g., McGill v. State*, 209 Ga. 500, 74 S.E.2d 78, 81-82 (1953); *Chronicle & Gazette Pub. Co., Inc. v. Attorney General*, 94 N.H. 148, 48 A.2d 478, 482 (1946), *appeal dismissed*, 329 U.S. 690 (1947); *Shuck v. Carroll Daily Herald*, 215 Iowa 1276, 247 N.W. 813 (1933); *In re Louis Wohl*, 50 F.2d 254, 255 (E.D. Mich. 1931); *Friedenburg v. Times Pub. Co.*, 170 La. 3, 127 So. 345 (1930); *Poughkeepsie Buying Service, Inc. v. Poughkeepsie Newspapers, Inc.*, 205 Misc. 982, 131 N.Y.S.2d 515 (1954); *see Associated Press v. U.S.*, 326 U.S. 1, 19 (1945).

question presented is exactly the same: whether newspapers may be required to publish (either as a "reply" or directly), advertisements, editorials, and articles which in the exercise of editorial judgment would not otherwise be printed. Section 104.38, Fla. Stat., curtails the exercise of journalistic discretion in the determination of what will be published in exactly the same fashion as the demands made in *Columbia Broadcasting System*, and kindred cases. In terms of the exercise of editorial judgment and the maintenance of journalistic integrity, the distinction between a demand for a "right of reply" such as that involved here and in Chicago *Joint Board, Amal. Cloth. Workers, supra*, and for "access" such as that raised in *Avins, supra*, is one without a difference. Both manifestly require the suspension of editorial discretion and permit the government through regulation to "commandeer the press and columns" of newspapers and thereby dictate the contents of those columns.

Columbia Broadcasting System and similar cases unmistakably hold that deciding what to publish and what not to publish rests within journalistic discretion which is protected against any governmental intrusion by the First Amendment. The Florida Supreme Court, upholding the constitutionality of §104.38, Fla.Stat., espoused a diametrically opposite view—that decisions by newspapers as to what they will publish may be suspended or abridged by governmental regulation. The Florida Supreme Court's view of the protections accorded by the First Amendment to newspapers in this case is in basic and irreconcilable conflict with the scope of that protection as expressed in *Columbia Broadcasting System* and kindred cases.

2. *Governmental regulations requiring publication must meet the same constitutional standards as regulations prohibiting publication.*

The Florida Supreme Court's decision conflicts with the rationale of this Court in *Columbia Broadcasting System* because of its conclusion that regulations which affirmatively require publication somehow stand on a different constitutional footing than regulations prohibiting publication. The decision below rests in large measure upon this supposed distinction between these two types of regulations. For example, the Florida Supreme Court specifically states that §104.38, Fla. Stat., "does not consitute an incursion upon First Amendment rights or a prior restraint, since no *specified newspaper content is excluded.*" (App. 8) (Emphasis in the original.) Thus, the Florida Supreme Court concluded that the statute at issue here, because it compels rather than prohibits publication, is not repugnant to the First Amendment.

The First Amendment admits of no such distinction. As the Ninth Circuit Court of Appeals stated in *Associates & Aldrich Co. v. Times Mirror Co., supra*, "There is no difference between compelling publication of material that the newspaper wishes not to print and prohibiting a newspaper from printing news or other material." 440 F.2d at 135.

The majority of decisions in this Court which have tested various statutes against the First Amendment guarantees have been in cases involving statutory restrictions upon publication. Unless these restrictions have been justified by a clear and present danger to a compelling state

interest, the statutes have consistently been voided. E.g., *Terminello v. Chicago*, 337 U.S. 1 (1949); *Musser v. Utah*, 333 U.S. 95 (1948); *Lovell v. Griffin*, 303 U.S. 444 (1938).

> "The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government." *New York Times Co. v. United States*, 403 U.S. 713, 717 (Justice Black concurring) (1971).

Just as the First Amendment forbids unwarranted censorship of the press which would prohibit or restrain publication, a statute compelling a newspaper to publish specific information also violates the First Amendment. Both types of regulations "fetter" the maintenance of journalistic integrity and affect "the impartial distribution of news," *Associated Press v. NLRB*, 301 U.S. 103, 133 (1973). Thus in sustaining a decree forbidding monopolistic activities of a press association, this Court carefully pointed out that the decree did "not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published." *Associated Press v. U.S.*, *supra* at 20. Just as a State cannot prohibit publication in the absence of a clear and present danger to a compelling state interest, a state may not become an editor and compel publication. "[L]iberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper." II Chafee, *Government and Mass Communications* 633 (1947).

3. There is no compelling state interest which justifies the intrusions which the Florida statute makes upon freedom of expression guaranteed by the First Amendment.

First Amendment freedoms may not be impinged upon unless there is a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. *E.g., Bridges v. California*, 314 U.S. 252, 262-63 (1941); *Craig v. Harney*, 331 U.S. 367 (1947). Statutes prohibiting any type of publication, particularly criminal statutes, are presumed unconstitutional unless it can be demonstrated that the infringement is justified by a "clear and present danger" to a critical public interest. *E.g., Thomas v. Collins*, 323 U.S. 516, 530 (1945); *Associated Press v. U.S.*, *supra* at 7.

Although there is no available legislative history for the 1913 Florida statute, the Supreme Court of Florida discussed two possible objectives of the statute which were used to justify its constitutionality. First, the Florida Supreme Court cited a proper legislative purpose in ensuring fair elections. This objective is insufficient basis for upholding the statute. This Court held in *Mills v. Alabama*, *supra*, that the reasonableness of a state's interest in fair elections cannot justify a criminal statute restricting the contents of a newspaper. *Mills* was ignored by the Supreme Court of Florida.

The second attempted justification of the statute was as a counter to alleged monopolization and concentration in the media. Even if the monopolization and concentration issues had properly been before the Florida Supreme Court, these issues would have provided no justification for up-

holding §104.38, Fla. Stat.* The Supreme Judicial Court of Massachusetts so ruled in a recent advisory opinion on the constitutionality of a proposed right of access statute.

> "The situation at which §39A [the proposed statute] is directed may be the 'monopolistic status' of certain news publications. However, complusion to publish all responsive political advertisements, applicable to all newspapers and other publications of general circulation in the Commonwealth, goes beyond what is essential to the furtherance of any interest of a State in its citizens having a right of access to newspapers in order to express, at their expense, political ideas which otherwise would not be published. See Barron, Access to the Press — A New First Amendment Right, 80 Harv. L. Rev. 1641, 1676-1678. Indeed no set of circumstances may exist which would support a legislative mandate that a newspaper or other publication of general circulation must publish a political advertisement. The views expressed and implied in the opinion of the court and in the dissenting opinions in the *Pittsburgh Press Co.* case, *supra*, [*Pittsburgh Press Co. v. Pittsburgh Committee on Human Relations*, ____ U.S. ____, 37 L.Ed.2d 669 (1973)] create substantial doubt that such legislation would pass

*The Florida Supreme Court's contention on this issue went totally beyond the issues raised by the Record in the case before that Court, or the Briefs of the parties filed in that Court. The sole factual support for the Court's contention was a magazine article appended to an Amicus Curiae Brief filed by an attorney on his own behalf. The Florida Supreme Court had never before taken judicial notice of such an article, much less given it substantive weight. In so doing, the Court violated its own rules, and abridged fundamental due process.

constitutional muster." *Opinion of the Justices*, 298 N.E.2d 829, 835 (Mass. 1973) (footnote om.).

Similar arguments of lack of access were asserted in *Resident Participation of Denver, Inc. v. Love*, *supra*, but the three-judge Court rejected the contention that newspapers can constitutionally be required to furnish free space for expression of views of citizens.

> "We are aware that lack of access to those media which reach large audiences has, some believe, given birth to a frustration which compels otherwise peaceful citizens to engage in violence to get their views to the nation. A cause of this frustration, one critic maintains, is that, although the courts have been vigorous in protecting free speech, they have been indifferent to creating opportunities for expression. Barron, Access to the Press — A New First Amendment Right, 80 Harv.L.Rev. 1641 (1967). We note, however, that while Professor Barron spends considerable space exploring a statutory solution to this problem, he devotes much less attention to constitutional arguments and but one paragraph to the problem of state action, which we find insurmountable. Professor Barron simply concludes, without noticeable explanation, that newspapers can be subjected to the 'constitutional restrictions which quasi-public status invites.' *Id.* at 1669. As desirable as this result might be, we are unable in good faith to reach it." 322 F.Supp. at 1105.

The separate opinion of Justice Douglas in *Columbia Broadcasting* likewise recognized and disposed of the con-

tention that alleged concentration in the media can be cured by a government *fiat* to be fair.

> "Thomas I. Emerson, our leading First Amendment scholar has stated that
>
> '. . . any effort to solve the broader problems of a monopoly press by forcing newspapers to cover all "newsworthy" events and print all viewpoints, under the watchful eyes of petty public officials, is likely to undermine such independence as the press now shows without achieving any real diversity.' The System of Freedom of Expression (1970), p. 671." ____ U.S. at ____, 36 L.Ed.2d at 811.

In addition to §104.38, there appear to have been only two similar "right of reply" statutes enacted in the United States. *Miss. Code Ann.* §3175 (1942) and *Nev.Rev. Stat.* §200.570 (1963).* The Mississippi statute was eviscerated in *Manasco v. Walley*, 63 So.2d 91 (Miss. 1953), which held that the statute could be invoked only if the publication concerning the candidate was *libelous*, even though the statute by its terms is invoked by a publication "reflect[ing] upon the honesty, integrity or moral character" of a candidate. *Id.* at 96. Nevada repealed its mandatory "right of reply" statute in 1969, and replaced it

*In addition, *Wis. Stat.* §895.05 provides that publication of a reply in lieu of a retraction prohibits a recovery against a newspaper in a defamation action other than actual damages. There is, furthermore, a fundamental difference between a right of retraction statute and the right of reply statute at issue here: the former is permissive, mitigating damages if a retraction is made and thus intended to encourage freedom of expression; the reply statute by contrast, is mandatory, with penal sanctions, and is designed to control the exercise of editorial discretion.

with a retraction statute. Ch. 310, Laws of Nevada, Fifty-Fifth Session (Act of April 14, 1969). The paucity of such legislation and the history of the few statutes that have been enacted illustrates the lack of necessity for "right of reply" or "access" to ensure that a diversity of views and ideas are disseminated among the people. Such legislation is inimical to our system of freedom of expression. Nevertheless, if the decision of the Florida Supreme Court is not reversed, it is likely that other States will consider similar statutes in a misguided effort to legislate fairness.

For these reasons, the solution to "the broader problems of a monopoly press" do not lie, as the Florida Supreme Court mistakenly conceived, in the imposition of regulations which substitute the government for the editor in the determination of what should be published. Indeed, as the Supreme Judicial Court of Massachusetts made plain in its *Opinion, supra*, there are "no set of circumstances . . . which would support a legislative mandate that a newspaper . . . must publish."

4. *The Florida Supreme Court's attempted analogy between permissible regulation of the press and of the broadcast media is invidious.*

Whatever continuing validity may inhere in the decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), this Court's subsequent decision in *Columbia Broadcasting System* leaves no doubt that the fairness doctrine is applicable and constitutionally permissible, if at all, solely and exclusively in the context of the broadcast media. It has long been recognized that differences between the media may justify differences in the extent to which First Amendment protections are accorded.

Burstyn v. Wilson, 343 U.S. 495 (1952). It may well be that *Red Lion*, *supra*, represents the outer limit of permissible governmental regulation of the content of radio and television station broadcasts, as this Court suggested in *Columbia Broadcasting System*. In any event, as Professor Emerson points out in his discussion of the significance of the *Red Lion* decision,

> "Government regulation designed to promote the system of freedom of expression takes on quite a different cast when it is applied to media of communication other than radio and television." *Emerson, The System of Freedom of Expression* 667 (1970).

The Florida Supreme Court's decision simply overlooks the fundamental constitutional distinction between the broadcast media and the press. In a remarkable analysis, the Court asserted that newspapers are subject to the same regulation as broadcast media because newspapers make use of the airwaves in their operations through telegraphs and other means of telecommunication. (App. 18) Carried to its logical conclusion, this line of reasoning would fully sustain, for example, regulations requiring newspapers to be licensed before they begin operations. That is precisely the sort of regulation which the framers of the First Amendment fully intended to forbid. The attempted analogy of the Court below between the statute at issue here and the question presented in *Red Lion*, *supra*, thus completely overlooks the fundamental differences, both in technology and in First Amendment principles, which exist between newspapers and the broadcast media.

That such a distinction does exist and is sustained on policy grounds is plain. It was recently reemphasized by this Court in *Columbia Broadcasting System*, *supra*, in the following language:

> "The tensions inherent in such a regulatory structure [of broadcasting] emerge more clearly when we compare a private newspaper with a broadcast licensee. The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers — and hence advertisers — to assure financial success; and, second, the journalistic integrity of its editors and publishers." ____ U.S. at ____, 36 L.Ed.2d at 792.

In *Columbia Broadcasting System*, this Court went on to say that the measure of freedom accorded to broadcasters is "not as large as that exercised by a newspaper." *Id.* If broadcasters cannot constitutionally be compelled to abdicate editorial discretion and accept material for broadcast, it follows, a *fortiori*, that newspapers whose range of discretion is even greater cannot be subjected to regulation which requires them to publish materials against their will.

The *Columbia Broadcasting* case was decided on May 29, 1973, after briefs had been submitted to the Florida Supreme Court in this case, but the decision was promptly called to the attention of that Court. Nevertheless, the Florida Supreme Court did not even mention *Columbia Broadcasting* in its *per curiam* opinion. *Columbia Broadcasting* was mentioned only in the specially concur-

ring opinion filed by Justice Roberts, in which five other members of the Court joined. Justice Roberts correctly reasoned that the *Columbia Broadcasting* case was distinguishable due to the differences between broadcast and other media. However, having distinguished broadcast media from other media, Justice Roberts reached the amazing conclusion that the press can be subjected to even *more* regulation than the broadcast media. Justice Roberts further asserted that the Court's *per curiam* opinion, which rested heavily upon the *Red Lion* case, did not conflict with *Columbia Broadcasting*, because *Red Lion* was adhered to in the later decision. A distinction was further discerned in that *Columbia Broadcasting* rejected a requirement that broadcasters accept paid advertising because, among other things, this would provide access only to the affluent, whereas the Florida statute provides access regardless of ability to pay. Such logic flies directly in the face of the long-established constitutional principle that the only basis for *any* regulation of the content of broadcasting is its unique use of limited airwaves. *E.g.*, *Columbia Broadcasting System, Inc. v. Democratic National Committee, supra*; *Red Lion Broadcasting Co. v. FCC, supra; National Broadcasting Company v. United States*, 319 U.S. 190, 226 (1943).

The difference, therefore, between regulation which may be permissible in the context of radio and television and that which is permitted with respect to the newspapers derives from the basic technology of the two media. As this Court recognized long ago in *National Broadcasting Company v. U.S., supra*, the regulation of broadcasting is virtually unavoidable since all who wish to speak over the airwaves simply cannot be permitted to do so or none will be heard. Whether the necessity of licensing broadcast

stations and the technology limitations of the spectrum are, of themselves, a sufficient ground to justify the Fairness Doctrine is, in light of this Court's evolving views as expressed in *Columbia Broadcasting System*, open to question. In any case, the only grounds upon which the Fairness Doctrine can be sustained is "the unique characteristics of electronic communication." *Capital Broadcasting Co. v. John Mitchell*, 333 F.Supp 582 (D.D.C. 1971), *aff'd* 405 U.S. 1000 (1972).

The direct conflict between the attempt by the Florida Supreme Court to draw an analogy between the broadcast and print media and this Court's views is illustrated by the following excerpts from the Court's opinion in *Columbia Broadcasting System:*

> "[T]he broadcast media pose unique and special problems not present in the traditional free speech case. Unlike other media, broadcasting is subject to an inherent physical limitation. . . . The Court spoke to this reality when, in *Red Lion*, we said 'it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.' *Red Lion, supra*, 395 U.S., at 388." ___ U.S. at ___, 36 L.Ed.2d at 783.
>
> • • •
>
> "Nor can we accept the Court of Appeals view that every potential speaker is 'the best judge' of what the listening public ought to hear or indeed the best judge of the merits of his or her views. All journalistic tradition and experience is

to the contrary. For better or worse, editing is what editors are for; and editing is selection and choice of material." ____ U.S. at ____, 36 L.Ed.2d at 796.

Similar views were expressed in the concurring opinions of Justices Douglas and Stewart:

Justice Douglas:

"It would come as a surprise to the public as well as to publishers and editors of newspapers to be informed that a newly created federal bureau would hereafter provide 'guidelines' for newspapers or promulgate rules that would give a federal agency power to ride herd on the publishing business to make sure that fair comment on all current issues was made.

• • •

"Of course there is private censorship in the newspaper field. But for one publisher who may suppress a fact, there are many who will print it. But if the government is the censor, administrative fiat not freedom of choice carries the day." ____U.S. at ____, 36 L.Ed.2d at 811, 812.

Justice Stewart:

"There is never a paucity of arguments in favor of limiting the freedom of the press. The Court of Appeals concluded that greater government control of press freedom is acceptable here because of the scarcity of frequencies for broad-

casting. But there are many more broadcasting stations than there are daily newspapers.

* * *

"Perhaps I overstate the logic of the opinion of the Court of Appeals. Perhaps its 'balancing' of First Amendment 'values' would require no more than that newspapers be compelled to give 'limited' access to dissident voices, and then only if those voices were 'responsible'. And perhaps it would require that such access be compelled only when there was a single newspaper in a particular community. But it would be a close question for me which of these various alternative results would be more grossly violative of the First Amendment's guarantee of a free press. For that guarantee gives *every* newspaper the liberty to print what it chooses and reject what it chooses, free from the intrusive editorial thumb of Government." ___ U.S. at ___, 36 L.Ed.2d at 807-808.

(Footnotes omitted)

The attempt by the Florida Supreme Court to analogize §104.38, Fla. Stat., with the Fairness Doctrine must, therefore, necessarily fail. The supposed analogy ignores completely the express and repeated statements by this Court that such constitutional merit as the Fairness Doctrine may have rests entirely on the "unique and special problems" presented by the technology of the electronics media which are wholly absent in the instant case. The reliance of the Court below upon *Red Lion* was thus error. If its decision permitted to stand, it will obliterate the

distinctions which this Court has found to exist between the media and will accord to newspapers a lesser measure of journalistic freedom than that accorded to broadcasters.

5. *The effect of the Florida statute will be to reduce, not increase, the flow of expression of political views.*

Section 104.38, Fla. Stat., cannot be permitted to stand because there is no compelling state interest to sustain a regulation which suspends the unfettered exercise of editorial discretion and requires the publication of material against the newspaper's will. The impact upon the vital role of a free press, if this statute is upheld, will be profound.

> "A free press stands as one of the greater interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

The Florida Supreme Court ignored numerous First Amendment cases in which statutes have been struck down which might have a constitutionally impermissible chilling effect on freedom of expression. For example, one of the principal reasons for the doctrine announced in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), was to provide more "elbow room" for free expression on subjects of public interest and concern.

> ". . . would-be critics of official conduct may be deterred from voicing their criticism, even

> though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.' *Speiser v. Randall, supra*, 357 U.S. at 526. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." *Id.* at 279.

See also, Rosenbloom v. Metromedia, 403 U.S. 29, 52-53 (1971); *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

As the District of Columbia held in *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967):

> "Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is 'hardly less virulent for being privately administered.'"

The intrusion of §104.38, Fla. Stat., reaches to "any matter" published in a newspaper, presumably including not only editorials, which were the basis of Tornillo's complaint in this case, but also news stories, columns, advertising, cartoons, and any other material. The statute, therefore, sweeps far broader than the narrow regulation of

classified advertising cautiously upheld by this Court in *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, ____ U.S. ____, 37 L.Ed.2d 669 (1973).

If a newspaper cannot print publications concerning political candidates unless it is prepared to publish their "replies" at its expense, the newspaper will be deterred from making the initial publications. Conscientious newspapers will be reluctant to print anything concerning impending elections if in doing so they become obligated to provide free space for "replies" that may be antithetical to the newspapers' views. Such "replies" could be obscene or libelous. The potential expense of printing the "replies" could be substantial due to the large number of candidates and the considerable amount of space that every responsible newspaper in this state devotes to coverage of elections. The deterrent effect of the statute is even more severe because it provides for criminal penalties, even though its interpretation is subject to considerable uncertainty, as discussed below.

B. The Vagueness and Ambiguity of the Florida Statute Significantly Increase Its Unconstitutional Effect Upon Legitimate Expression

Even if some form of reply or access statute might theoretically be compatible with the First Amendment, §104.38, Fla. Stat., is not such a statute. The statute's vagueness and ambiguity result in uncertainty as to its meaning, greatly increasing its inhibitory effect upon the free expression protected by the First Amendment.

It is fundamental that restrictions upon free expression, even if otherwise constitutional, may violate the First Amendment if they are insufficiently precise.

> "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966). (fn.om.)

The constitutional test of definiteness is particularly strict in the case of a criminal statute such as §104.38, Fla. Stat. *E.g., NAACP v. Button*, 371 U.S. 415, 432-33 (1963); *Winters v. New York*, 333 U.S. 507, 515 (1948).

The principal ambiguities in the statute include the following:

(i) What is a "newspaper"? Does the term include any publication, such as magazines, newsletters, pamphlets, brochures and handbills? Does it include "newspapers" published in other states but circulated in Florida?

(ii) Does the term "columns" in the statute include editorials, signed columns, news articles and letters to the editor? Does the term include advertisements? Cartoons? Does the term include replies published pursuant to §104.38, Fla. Stat.?

(iii) What is an "assault" on personal character, or an "attack" on an official record? Do they merely en-

compass criticism, no matter how truthful or valid? Does personal character include any individual human quality?

(iv) Need a "candidate" be mentioned specifically by name to be entitled to a reply, or does a reply right arise if a "candidate" can be identified in a publication, even though not named? If a publication refers to a group, does each member of the group have a right to reply?

(v) What is an equally "conspicuous" place for publication of a reply? Is page four of a newspaper as conspicuous as page five?

(vi) How lengthy a reply may be made? If a newspaper editorial states only, "John Doe is not fit for office," what is the length of the permitted reply? Seven words? Can a statute providing such a "reply" be seriously considered as enhancing public discussion?

Although both lower Florida courts which passed upon the statute held it void for vagueness, the Florida Supreme Court sought to circumvent this obstacle in two ways. First, the Court sought to resolve certain ambiguities in the statute by interpretation, holding that a newspaper need not publish a reply unless it was:

> "wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane." (App. 16)

Such an interpretive approach which seeks to remedy massive gaps in the statute cannot cure constitutional infirmities. Criminal statutes affecting freedom of expression must delineate precise standards of conduct without resort to wholesale judicial construction. *Winters v. New York, supra* at 515 (1948); *Ashton v. Kentucky, supra; NAACP v. Button, supra.* Moreover, despite the Florida Supreme Court's efforts, major ambiguities and uncertainties remain. The unconstitutional effect of the statute cannot be diminished by the Court's intentions, expressed in its *per curiam* decision denying the Petition for Rehearing, to refine and define the statute's terms in future cases. *E.g.,Giaccio v. Pennsylvania,* 382 U.S. 399 (1966).

The second aspect of the Florida Supreme Court's curative effort was its holding that because the plaintiff was seeking only civil remedies, the Court need not pass upon whether the statute measured up to standards required of criminal statutes. The Court reasoned that even if the statute was impermissibly vague so that it could not be the basis of a criminal prosecution, the statute was sufficient for an implied civil right of action. The Court thus held, in effect, that an unconstitutionally vague criminal statute may be invoked for a civil remedy. Such logic is without precedent.

CONCLUSION

In upholding the constitutionality of §104.38, Florida Statutes, the Supreme Court of Florida ignored fundamental First Amendment principles. The questions presented by this appeal are substantial, with major implications for the public interest in freedom of speech and of the press.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF FLORIDA

CASE NO. 43,009

PAT L. TORNILLO, JR.,

Appellant,

vs.

THE MIAMI HERALD PUBLISHING COMPANY,
a Division of Knight Newspapers, Inc.,

Appellee.

July 18, 1973

PER CURIAM

This cause is before us upon direct appeal from Circuit Court of Dade County, holding Florida Statute 104.38[1] unconstitutional thereby vesting jurisdiction in this Court under Article V, Section 3(b)(1), Florida Constitution, as amended 1973.

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[1]F.S. §104.38 — Newspaper assailing candidate in an election; space for reply — If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083.

Appellant Tornillo, plaintiff below, who was a candidate for the State Legislature demanded that appellee print verbatim his replies to two editorials printed therein attacking appellant's personal character. The appellee refused and Tornillo filed complaint for declaratory and injunctive relief and punitive damages. Pursuant to Florida Statute 86.091, the Attorney General of this State was advised that appellant intended to contest the constitutionality vel non of Florida Statute 104.38. In view of the circumstances, the trial court granted the request for an emergency hearing.

Preliminarily, the trial court determined that the statutory provision in question is a criminal statute and that absent special circumstances, equity will not ordinarily enjoin commission of a crime. Pompano Horse Club Co. v. State, 93 Fla. 415, 111 So. 801 (1927). Notwithstanding this infirmity in appellant's complaint, the trial court further concluded that F.S. §104.38 is violative of Article I, Sections 4 and 9 of the Constitution of Florida and the Fourteenth Amendment to the Constitution of the United States as a restraint upon freedom of speech and press and because it is impermissibly vague and indefinite.

Believing that the promulgation of this statute is authorized by Article IV, Section 4,[2] and the First[3] and Fourteenth Amendments to the Constitution of the United

[2]Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion; and On Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

[3]Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; . . .

States, and Article VI, Section 1,[4] and Article I, Section 4[5] of the Florida Constitution, and believing that this statute enhances rather than abridges freedom of speech and press protected by the First Amendment, we hold that it does not constitute a violation of the First and Fourteenth Amendments to the Constitution of the United States or Article I, Section 4, Florida Constitution.

The election of leaders of our government by a majority of the qualified electors is the fundamental precept upon which our system of government is based, and is an integral part of our nation's history. Recognizing that there is a right to publish without prior governmental restraint,[6] we also emphasize that there is a correlative responsibility that the public be fully informed.

The entire concept of freedom of expression as seen by our founding fathers rests upon the necessity for a fully informed electorate. James Madison wrote that, "A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy; or, perhaps both. Knowledge will forever govern ignorance;

[4]Section 1. Regulation of elections. — All elections by the people shall be by direct and secret vote. General elections shall be determined by a plurality of votes cast. Registration and elections shall, and political party functions may, be regulated by law.

[5]Section 4. Freedom of speech and press. — Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.

[6]Near v. Minnesota, 283 U.S. 697, New York Times v. United States, 430 U.S. 713, Martin v. City of Struthers, 319 U.S. 141, Lamonet v. Postmaster General, 381 U.S. 301.

and a people who mean to be their own governors, must arm themselves with the power which knowledge gives (to W. T. Barry, August 4, 1822)."[7]

The public "*need to know*" is most critical during an election campaign. By enactment of the first comprehensive corrupt practices act relating to primary elections in 1909 our legislature responded to the need for insuring free and fair elections. Article III, Section 26, and Article VI, Section 9, Constitution of Florida 1885, commanded the Legislature to pass laws "regulating elections and prohibiting under adequate penalties, all undue influence thereof from power, bribery, tumult or other improper practices" and to "enact such laws as will preserve the purity of the ballot given under this Constitution." This act of 1909 did not deal with the subject of the wrongful use of newspapers or other printed or written matter, with the exception of a provision which declared it to be a misdemeanor for any candidate or other person to have or distribute on day of primary at or near any polling place any writing against any candidate in the primary. Florida Statute 104.38 was originally enacted in 1913 as Chapter 6470, Section 12, Laws of Florida, 1913.[8] This second act adopted

[7]6 Writings of James Madison 398 (Hunt Ed. 1906), The Complete Madison 337 (1953).

[8]Chapter 6470, Section 12 (Laws of Florida, 1913), provided, "That if any newspaper in its columns assails the personal character of any candidate for nomination in a primary election, or charges such candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall, upon request of such candidate, immediately publish free of cost any reply he may make thereto, in as conspicuous a place and in the same kind of type as the matter that calls for such reply; provided, such reply does not take up more space than the matter replied to. A person who fails to comply with the provisions of this Section, shall upon conviction be punished by fine not exceeding five hundred dollars, or by imprisonment." See subsequent history of stat-

in 1913 known as the corrupt practices act was enacted to supplement the act of 1909. The statutory provision, the constitutionality vel non which is being questioned in the instant cause, was enacted not to punish, coerce or censor the press but rather as a part of a centuries old legislative task of *maintaining conditions conducive to free and fair elections.* The Legislature in 1913 decided that owners of the printing press had already achieved such political clout that when they engaged in character assailings, the victim's electoral chances were unduly and improperly diminished. To assure fairness in campaigns, the assailed candidate had to be provided with an equivalent opportunity to respond; otherwise not only the candidate would be hurt *but also* the people would be deprived of both sides of the controversy.[9]

What some segments of the press seem to lose sight of is that the First Amendment guarantee is "not for the

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ute, Section 5927, Revised General Statutes of Florida, 1920, entitled newspaper assailing candidate must give free space for reply. This provision was re-enacted as Section 875.40, Florida Statutes, which varies only slightly from the present law. Section 875.40, Florida Statutes was identical to Chapter 6470, Section 12 (Laws of Florida, 1913). In 1951, the Legislature renumbered and slightly revised this provision to cover any elections (not just primaries) and to provide that, "Any one failing to comply with the provisions of the section shall, upon conviction, be guilty of a misdemeanor." Chapter 268.70, Laws of Florida, 1951. Section 104.38 was entitled, "Newspaper assailing candidate in election; space for reply." See also Chapter 28151, General Laws, 1953, which adds the words "or for election" so that the preliminary portion of the statute reads: "If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election . . . " In 1972, HB 2801 attempting to repeal F.S. 104.38 died in committee.

[9]Ex Parte Hawthorne, 116 Fla. 608, 156 So. 619 (1934). 9 Florida L.J. 297 (1935), "Brief History of the Corrupt Practices Act of Florida," J. V. Keen.

benefit of the press so much as for the benefit of us all."[10] Speech concerning public affairs is more than self expression. It is the essence of self government.[11]

Mr. Justice Learned Hand expressed the role of the press well when he emphasized,

> "However neither exclusively, nor even primarily are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: The dissemination of news from as many different sources and with as many different facets and colors as possible."[12]

In Pennekamp v. Florida, 328 U.S. 331 (1946), the Supreme Court of the United States emphasized that the power of the press must be tempered with responsibility when it explained,

> "Without a free press there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society. The scope and nature of the constitutional protection of freedom of speech must be viewed in that light and in that light applied. . . .
> "A free press is vital to a democratic society because its freedom gives it power. Power in a democracy implies responsibility in its exercise.

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[10]Time, Inc. v. Hill, 385 U.S. 374, 389.

[11]Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

[12]United States v. Associated Press, 52 F.Supp. 362, 372.

No institution in a democracy, either governmental or private, can have absolute power. Nor can the limits of power which enforce responsibility be finally determined by the limited power itself. . . . In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise. Most State constitutions expressly provide for liability for abuse of the press's freedom. That there was such legal liability was so taken for granted by the framers of the First Amendment that it was not spelled out. Responsibility for its abuse was embedded in the law. The First Amendment safeguarded that right.

"The press does have the right, which is its professional function, to criticize and to advocate. The whole gamut of public affairs is the domain for fearless and critical comment, and not the least the administration of justice. But the public function which belongs to the press makes it an obligation of honor to exercise this function only with the fullest sense of responsibility. Without such a lively sense of responsibility a free press may readily become a powerful instrument of injustice." [Emphasis Supplied]

The concept which appears throughout the decisions underlying First Amendment guarantees that there is a broad societal interest in the free flow of information to the public by the Supreme Court of the United States was explicitly stated in *New York Times v. Sullivan*, 376 U.S. 254 (1964), as well as other Supreme Court decisions, as follows:

> "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Roth vs. United States, 354 U.S. 476, 484, 1 L.Ed.2d 1498, 1506, 77 S.Ct. 1304. The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the republic, is a fundamental principle of the constitutional system."

The statute here under consideration is designed to add to the flow of information and ideas and does not constitute an incursion upon First Amendment rights or a prior restraint, since no *specified newspaper content is excluded.* There is nothing prohibited but rather it requires, in the interest of full and fair discussion, additional information.

The right of the public to know all sides of a controversy and from such information to be able to make an enlightened choice is being jeopardized by the growing concentration of the ownership of the mass media into fewer and fewer hands, resulting ultimately in a form of private censorship. Through consolidation, syndication, acquisition of radio and television stations and the demise of vast numbers of newspapers, competition is rapidly vanishing and news corporations are acquiring monopolistic influence over huge areas of the country. We take note of a recent

article in Florida Trend magazine, March 1973, explicating that the Miami Herald is the largest newspaper published in Florida, that it is larger in size than the next two largest newspapers; and that it is not only a large city daily newspaper but also is a regional and international newspaper.

Freedom of expression was retained by the people through the First Amendment *for all the people* and *not merely for a select few.* The First Amendment *did not create a privileged class* which through a monopoly of instruments of the newspaper industry would be able to *deny to the people the freedom of expression* which the First Amendment guarantees. The Supreme Court of the United States in *Associated Press v. United States*, 326 U.S. 1, 20, clearly expounded,

> "It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.

> Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity."

More recently in *Red Lion Broadcasting Co. v. F.C.C.*, 381 F.2d 908, affirmed 395 U.S. 367 (1969), the Supreme Court opined,

> "Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public. Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. 'Freedom of the press from governmental interference under the First Amendment does not

> sanction repression of that freedom by private interests.' *Associated Press v. United States*, 326 U.S. 1, 20 (1945)."

By this tendency toward monopolization, the voice of the press tends to become exclusive in its observation and its wisdom which in turn deprives the public of their right to know both sides of controversial matters.

Appellant urges that if a newspaper may attack a candidate with impunity and he is provided no right to reply, the public interest in free expression suffers, because they can only hear the publisher's side of the controversy and are denied the dissenting view.

Although we have carefully considered appellee's argument that *Red Lion Broadcasting Co. v. F.C.C.*, supra, is inapplicable to the present cause, we cannot discount certain excerpts therefrom which are applicable to First Amendment guarantees in general. Therein, the Supreme Court explained that,

> "Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication." 395 U.S. at 401, n. 28.

That Court further stated in *Red Lion Broadcasting v. F.C.C.*, supra, at 390, in *Associated Press v. U.S.*, supra, at 20, and *New York Times v. Sullivan*, supra, at 270, that it is the purpose of the First Amendment to preserve

an uninhibited marketplace of ideas wherein truth will prevail rather than to countenance a monopolization of that market whether by government or private enterprise.

Florida's right of reply statute is consistent with the First Amendment as applied to this State through the Fourteenth Amendment. In *Rosenbloom v. Metromedia*, 403 U.S. 29, 47, we find that the Supreme Court of the United States is inclined to this position by the following quote from the majority opinion:

> "Furthermore, in First Amendment terms, the cure seems far worse than the disease. If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern."

To this comment, the Court appended the following note:

> "Some States have adopted retraction statutes or right-of-reply statutes. See Donnelly, The Right of Reply: An Alternative to an Action for Libel, 34 Va. L.Rev. 867 (1948); Note, Vindication of the Reputation of a Public Official, 80 Harv. L.Rev. 1730 (1967). Cf. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).
>
> "One writer, in arguing that the First Amendment itself should be read to guarantee a right of access to the media not limited to a right to respond to defamatory falsehoods, has suggested several ways the law might encourage public dis-

> cussion. Barron, Access to the Press — A New First Amendment Right, 80 Har. L. Rev. 1641, 1666-1678 (1967). It is important to recognize that the private individual often desires press exposure either for himself, his ideas, or his causes. Constitutional adjudication must take into account the individual's interest in access to the press as well as the individual's interest in preserving his reputation, even though libel actions by their nature encourage a narrow view of the individual's interest since they focus only on situations where the individual has been harmed by undesired press attention. A constitutional rule that deters the press from covering the ideas or activities of the private individual thus conceives the individual's interest too narrowly."

Although appellee attempts to minimize the import of the aforestated quotation, we feel compelled to note that such remarks regarding right to reply legislation are entirely consistent with past precedent establishing the fundamental purpose of the First Amendment to inform the people.

Neither appellant nor appellee takes issue with the holding of the trial court that it lacked jurisdiction to enjoin an alleged violation of Florida Statute 104.38. This provision is criminal in nature and absent special circumstances equity will usually not enjoin commission of a crime.[11]

Appellant urges that the Right of Reply Statute in question is neither impermissibly vague nor unnecessarily

[11]Pompano Horse Club Co. v. State, supra, 17 Fla. Jur. Injunctions, §46.

broad. We must agree and therefore uphold the constitutionality of this statutory provision. It is a fundamental principle that this Court has the duty, if reasonably possible, consistent with protection of constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality and if reasonably possible a statute should be construed so as not to conflict with the constitution.[14] Courts are inclined to adopt that reasonable interpretation of a statute which removes it farthest from constitutional infirmity. In *Gitlow v. People of New York*, 268 U.S. 652, the Supreme Court of the United States stated every presumption is to be indulged in favor of the validity of a statute, and the case is to be considered in the light of the principle that the State is primarily the judge of regulations in the interest of public safety and welfare.

We do not believe that Florida's statutory right of reply is lacking in any of the required standards of preciseness. The statute is sufficiently explicit to inform those who are subject to it as to what conduct on their part will render them liable to its penalties.

We recognize that certainty is all the more essential when vagueness might induce individuals to forego their rights of speech, press and association for fear of violating an unclear law. *Scull v. Virginia*, 359 U.S. 344 (1959), *Ashton v. Kentucky*, 384 U.S. 195 (1965).

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[14]Buck v. Gibbs, 34 F. Supp. 510, Mod. 313 U.S. 387 (1940); Hunter v. Owens, 80 Fla. 812, 86 So. 839 (1920); Cragin v. Ocean 4 Lake Realty Co., 133 So. 569, 135 So. 795 (1931), appeal dism. 286 U.S. 523; Haworth v. Chapman, 113 Fla. 591, 152 So. 663 (1933); Hanson v. State, 56 So.2d 129 (1952); Overstreet v. Blum, 227 So.2d 197 (Fla. 1969); Hancock v. Sapp, 225 So.2d 411 (Fla. 1969); Rich v. Ryals, 212 So.2d 641 (Fla. 1968).

In *Brock v. Hardie*, 154 So. 690, 694 (1934), relative to the issue of vagueness, this Court said,

> "Whether the words of the Florida statute are sufficiently explicit to inform those who are subject to its provisions what conduct on their part will render them liable to its penalties is the test by which the statute must stand or fall, because, as was stated in the opinion above mentioned, 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'
>
> "Such seems to be the test approved by the Supreme Court of the United States. Citation of authorities as to what may be considered the exact meaning of the phrase 'so vague that men of common intelligence must necessarily guess at its meaning,' so that certain conduct may be considered within or outside the true meaning of that phrase, or what language of a statute may lie within or without it, would be of little aid to us.
>
> "We must apply our own knowledge with which observation and experience have supplied us in determining whether words employed by the statute are reasonably clear or nor (sic) in indicating the legislative purpose, so that a person who may be liable to the penalties of the act may know that he is within its provisions or not."

Inter alia, appellee attacks the constitutionality of the statute on grounds of vagueness and overbreadth because of the use of the term "any"—referring to the type of reply allowable. This statute provides in part,

> "if any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply . . . ." [Emphasis Supplied]

Because of the longstanding policy of this Court to give a statute, if reasonably possible, a construction supporting its constitutionality, we hold that the mandate of the statute refers to "any reply" which is wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane.

We conclude that the statute in question is as certain and definite as others heretofore upheld as constitutionally permissible. The following statement made by Judge Tamm in *Red Lion Broadcasting Co. v. F. C. C.*, supra, 381 F.2d at 921, is clearly applicable to the instant cause: "Here there is no broad-reaching, all-embracive statutory provision penalizing knowing as well as unknowing conduct."

Although apparently not raised before the trial court, the brief of Amicus Times Publishing Co. has raised the issue that Florida Statute 104.38 is a deprivation of property right without due process. With this contention, we can not agree. Florida Statute 104.38 is a valid exercise of the state police power enacted to assure the integrity of the electoral process. In *Miller v. Schoene*, 276 U.S. 272 (1928), the Supreme Court stated,

> "And where the public interest is involved preferment of that interest over the property interest of the individual, to extent even of its destruction, is one of the distinguishing characteristics of every exercise of police power which affects property." Id. at 279, 280.

We find this argument of deprivation of property rights by being required to furnish free space to be without merit. See *Miller v. Schoene*, supra; *Marsh v. Alabama*, 326 U.S. 501, at 506; *Red Lion Broadcasting v. F. C. C.*, supra; *Rosenbloom v. Metromedia*, supra; *Chronicle Publishing Co. v. Attorney General*, 94 N.H. 148, 48 A.2d 478 (1946); *Amalgamated Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

In conclusion, we do not find that the operation of the statute would interfere with freedom of the press as guaranteed by the Florida Constitution and the Constitution of the United States. Indeed it strengthens the concept in that it presents both views leaving the reader the freedom to reach his own conclusion. This decision will encourage rather than impede the wide open and robust dissemination of ideas and counterthought which the concept of free press both fosters and protects and which is essential to intelligent self government.

Newspapers are not wholly dependent on electronic media as were the broadcasters in *Red Lion Broadcasting Co. v. F. C. C.*, supra. However, we have no difficulty in taking judicial notice that the publishers of newspapers in this contemporary era would perish without this vital source of communications. The dissemination of news other than purely local is transmitted over telegraph wires or over air waves. This not only includes dissemination of news but also in chain newspaper operations so prevalent today, the Miami Herald being one; even editorials are prepared in one place and transmitted electronically to another. Therefore, the principles of law enunciated in *Red Lion Broadcasting Co. v. F. C. C.*, supra, have been taken into consideration in reaching our opinion.

A half free press would be deceptive to the public. Florida Statute 104.38, in the interest of all the people, provides that candidates for public office under certain prescribed circumstances shall have a right of reply, a right of expression. It does not deny to the owner of the instruments of the newspaper industry any right of expression. The statute *assures*, and *does not abridge*, the right of expression which the First Amendment guarantees. The statute supports the freedom of the press in its true meaning—that is, the right of the reader to the whole story, rather than half of it—and without which the reader would be "blacked out" as to the other side of the controversy.

For the foregoing reasons, we find Florida Statute 104.38 to be constitutional and reverse the holding of the trial court that it is unconstitutional.

Accordingly, the judgment of the trial court is reversed and this cause is remanded to the trial court for further proceedings not inconsistent herewith.

It is so ordered.

CARLTON, C.J., ADKINS, McCAIN and DEKLE, JJ., and RAWLS, District Court Judge, Concur
ROBERTS, J., Concurs Specially with Opinion
BOYD, J., Dissents with Opinion
ROBERTS, J., Specially Concurring:

I concur in the opinion and judgment of the majority. We are fully cognizant of the recent decision rendered by the Supreme Court of the United States in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, ——U.S.——, 41 U.S.L.W. 4688, decided May 29, 1973, which holds that neither the Federal Communications Act nor the First Amendment require broadcasters to accept paid editorial advertisements. But this opinion in no way derogated the earlier opinion of that court in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969), validating the fairness doctrine of the Federal Communications Commission which imposes two affirmative responsibilities on the broadcaster—coverage of issues must be adequate and must fairly reflect differing viewpoints. As the Supreme Court stated in *Columbia Broadcasting*, supra, "In fulfilling its Fairness Doctrine obligations, the broadcaster must provide free time for the presentation of opposing views if a paid sponsor is unavailable, . . . and must initiate programming on public issues if no one else seeks to do so. See John J. Dempsey, 6 P & F Radio Reg. 615 (1950); Red Lion, supra, 395 U.S., at 378."

The complaints filed in *Columbia Broadcasting*, supra, by the Democratic National Committee and the Business Executives Move for Vietnam Peace, alleged that a broadcaster had violated the First Amendment by refusing to sell it time to broadcast spot announcements expressing political views of the different groups. The Supreme Court turned its decision primarily on the limited nature of the broadcasting airwaves and the existence of the Fairness Doctrine which requires broadcasters to provide free time for presentation of opposing political views when a paid sponsor is not available. The decision in Columbia Broadcasting is directed solely to the peculiar and limited nature of broadcasting frequencies, and that decision is not applicable to the instant facts presently before this Court in the case sub judice. Chief Justice Burger commences the body of his opinion with the following remarks:

> "Mr. Justice White's opinion for the Court in Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969), makes clear that the broadcast media pose unique and special problems not present in the traditional free speech case. Unlike other media, broadcasting is subject to an inherent physical limitation. Broadcast frequencies are a scarce resource; they must be portioned out among applicants. All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated. The Court spoke to this reality when, in Red Lion, we said 'it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.' Red Lion, supra, 395 U.S., at 388.

"Because the broadcast media utilize a valuable and limited public resource, there is also present an unusual order of First Amendment values. Red Lion discussed at length the application of the First Amendment to the broadcast media. In analyzing the broadcasters' claim that the Fairness Doctrine and two of its component rules violated their freedom of expression, we held that '[n]o one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a denial of free speech." Red Lion, supra, 395 U.S., at 389. Although the broadcaster is not without protection under the First Amendment, United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948), '[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.' Red Lion, supra, 395 U.S., at 390."

After recounting the history of broadcast regulations, the court in *Columbia Broadcasting*, supra, opined that broadcasters are charged with the duty of providing the listening and viewing public with access to a balanced presentation of information on issues of public importance. The Supreme Court was particularly concerned with forcing broadcasters to accept paid political advertisements when broadcasting frequencies are so limited because of a substantial risk that such a system would be monopolized by

those who could and would pay the costs, and that a system so heavily weighted in favor of the financially affluent or those with access to wealth would in effect undermine the effective operation of the Fairness Doctrine. The views of the affluent would prevail since they would have it within their power to purchase time more frequently, and editorial advertising could then be monopolized by those of one political persuasion. Those were the concerns of the Supreme Court in *Columbia Broadcasting*, supra, when it rendered its decision that broadcasters are not required to accept paid editorial advertisements regardless of the content thereof.

Our opinion in the instant cause in no way conflicts with the recent decision of the Supreme Court in *Columbia Broadcasting*, supra.

CARLTON, C.J., ADKINS, McCAIN and DEKLE, JJ., and RAWLS, District Court Judge, Concur

BOYD, J., Dissenting:

I respectfully dissent.

This statute carries a penalty provision for violations thereof, and it therefore must be most strictly construed in favor of any person accused thereunder. The statute is so vague on its face as to raise doubts in the minds of those reading it as to the exact underlying legislative intent.

There are no standards as to when a publisher must carry a reply. For example, the following are just some of the important questions left unanswered by this statute.

Does the law include both news stories and editorial comment? If a story mentions a "situation", but does not mention the candidate by name, may he reply? When the publisher knows his statements are true, must he publish a statement from the candidate which he knows to be false? If the reply of the candidate libels other persons, must the publisher print it, and, if so, is the publisher subject to liability for any resulting libel suit? If the candidate's reply were to contain obscene language, would the publisher still have to print it—and thereby invite prosecution under our obscenity laws?

The First Amendment to the Constitution of the United States provides that, "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." Article I, Section 4 of the Constitution of the State of Florida similarly provides: "No law shall be passed to restrain or abridge the liberty of speech or of the press." Since these constitutional provisions prohibit the government from limiting the right of the publishing press to publish news and comment editorially, it would be equally unconstitutional for the government to compel a publisher to print a statement of any other person, or persons, against that publisher's will.

The majority opinion correctly observes that freedom of speech and freedom of the press carry the duty to speak the truth. And, of course, the constitutional rights of freedom of speech and freedom of the press must be exercised with appropriate regard to the provisions of our libel and obscenity statutes. As in all other areas of public and private service, some errors will, from time to time, surely occur. Yet, recognizing that the survival of a free press is contingent upon the press fulfilling its duty to the gen-

eral public, the overwhelming majority of those in the publishing press comply with the highest of ethical standards.

We are taught in the Bible that, "the truth will make you free".[1]

Free people can make proper decisions for their own self-government only when they are adequately informed by a free press. To the extent that government limits or adds to that which a publisher must distribute, freedom of speech and freedom of the press are thereby diminished.

Almost everyone whose name has been carried frequently in the news media has been offended, at one time or another, by stories or comments with which he disagrees. This is part of the price one pays for success and notoriety. If there exists a problem in this state of affairs, the muzzling of a free press is not the solution to such problem.

I therefore dissent.

[1]John 8:32

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

CASE NO. 43,009

PAT L. TORNILLO, JR.,

Appellant,

vs.

THE MIAMI HERALD PUBLISHING COMPANY,
a Division of Knight Newspapers, Inc.,

Appellee.

October 10, 1973

ON PETITION FOR REHEARING

PER CURIAM

Appellee, Miami Herald, by petition for rehearing strenuously argues that this Court's opinion overlooks the fact that §104.38, Florida Statutes, is a criminal statute and that this Court is without power to rewrite or perform plastic surgery on a criminal statute in an attempt to cure the statute's vagueness by writing a definition of "reply". Appellee then journeys upon numerous hypothetical inquiries—What is a newspaper? What is an assault? What is an equally "conspicuous place"?—and then reasons that these "obvious ambiguities" render the subject statute so vague that same must be held unconstitutional.

As was emphatically stated in the opinion of this Court, the action underlying this cause before us is a civil action which was filed in the Circuit Court for the Eleventh Judicial Circuit seeking to require appellee to publish appellant's reply pursuant to Florida Statute 104.38 and for damages. No criminal penalty is sought in the case sub judice, and, therefore, the validity vel non of the criminal penalty is not here involved. We are not unmindful of the line of decisions from this Court and the Supreme Court of the United States requiring more specificity in statutory authorship to support a statute which imposes a criminal penalty. However, the language of our opinion clearly defines what would constitute a wrongdoing. We take this opportunity to restate the following excerpt from our opinion:

> "It is a fundamental principle that this Court has the duty, if reasonably possible, consistent with protection of constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality and if reasonably possible a statute should be construed so as not to conflict with the constitution.[1] Courts are inclined to adopt that reasonable interpretation of a statute which removes it farthest from constitutional infirmity. In *Gitlow v. People of New York*, 268 U.S. 652, the Supreme Court of the United States stated every presumption is to be

[1]Buck v. Gibbs, 34 F.Supp. 510, Mod. 313 U.S. 387 (1940); Hunter v. Owens, 80 Fla. 812, 86 So. 839 (1920); Cragin v. Ocean & Lake Realty Co., 133 So. 569, 135 So. 795 (1931), appeal dism. 286 U.S. 523; Haworth v. Chapmen, 113 Fla. 591, 152 So. 663 (1933); Hanson v. State, 56 So.2d 129 (1952); Overstreet v. Blum, 227 So.2d 197 (Fla. 1969); Hancock v. Sapp, 225 So.2d 411 (Fla. 1969); Rich v. Ryals, 212 So.2d 641 (Fla. 1968).

> indulged in favor of the validity of a statute, and the case is to be considered in the light of the principle that the State is primarily the judge of regulations in the interest of public safety and welfare."

Even had this Court found the statute, the constitutionality vel non which is being questioned sub judice, not to be sufficiently definite and specific to support a criminal penalty, this criminal penalty provision would not be fatal to the statute because the statute is so constructed that the criminal penalty can be easily severed and deleted and still leave a complete legislative expression establishing a civil right to damages. This Court has long held that where certain clauses, provisions, or sections of a statutory enactment are in violation of constitutional mandates, it does not necessarily follow that the whole enactment should fail, and this Court has held that the Court may sever the unconstitutional provision and uphold the remainder if that which is left is complete in itself, sensible, and capable of being executed, whether or not the enactment contains a severability clause. *State ex rel. Boyd v. Deal*, 24 Fla. 293, 4 So. 899 (1888), *Gwynn v. Hardee*, 92 Fla. 543, 110 So. 343 (1926); *Louis K. Liggett Co. v. Lee*, 149 So. 8 (Fla. 1933); *City of Daytona Beach v. Harvey*, 48 So.2d 924 (Fla. 1950); *Youngblood v. Darby*, 58 So.2d 315 (Fla. 1952); *Harris v. Bryan*, 89 So.2d 601 (Fla. 1956); *Cramp v. The Board of Public Instruction of Orange County*, 137 So.2d 828 (Fla. 1962); *Davis v. State*, 146 So.2d 892 (Fla. 1962); *Musleh v. Marion County*, 200 So.2d 168 (Fla. 1967); *Small v. Sun Oil Company*, 222 So.2d 196 (Fla. 1969). In *State v. Newell*, 85 So.2d 124 (Fla. 1956), this Court opined:

"We have held that it is not always necessary to declare an entire Act invalid where a portion thereof is unconstitutional simply because the Act does not contain a severability clause. State v. Calhoun County, 126 Fla. 376, 170 So. 883, 886, and cases therein cited. The test is whether this court can say that the Legislature would not have enacted the law under scrutiny except for the provision which is herein held unconstitutional and invalid."

A comparable statute to Florida Statute 104.38 requiring a full and fair correction, apology, and retraction to be published in the same editions or corresponding issues of the periodical in which said article appeared, and in as conspicuous place and type as was said original article,[2] as an abatement of the publisher's liability for punitive damages, was held constitutional by this Court in *Ross v. Gore*, 48 So.2d 412 (Fla. 1950). Courts have generally regarded this type of statute to be in aid of a free press. We take judicial notice that this statute has been frequently used to avoid punitive damages apparently with no adverse effect to newspaper publishers. But, indeed, this statute has been utilized to their financial advantage.

---

[2]Florida Statute 770.02 provides:

"If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case shall recover only actual damages."

We also here note another retraction statute promulgated by the Florida Legislature which defines a procedure for abatement of criminal penalty. Florida Statute 836.08 provides:

> "Correction, apology, or retraction by newspaper. —If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then any criminal proceeding charging libel based on an article so retracted, shall be discontinued and barred."

Reverting to the hypothetical inquiries posed by appellee, it is observed that similar questions might well be posed as to the vagueness of certain provisions of Florida Statute 770.02, viz: "good faith"; "falsity"; "a full and fair correction"; "apology"; "conspicuous place"; and Florida Statute 836.08, viz: "correction"; "apology"; "reasonable grounds"; or "a full and fair correction". In short, the definition and meaning of specific words or phrases in a particular factual situation have been and will be an infinite subject of inquiry so long as Homo sapiens engage in the art of communication. At this stage of the instant controversy, we are confronted not with the wisdom of the Legislature in enacting the challenged statutory provision;

our task is to preserve the prerogative of the legislative body unless it clearly contravenes the basic federal and state charters adopted by our citizenry.

In conclusion, it must be remembered that First Amendment Freedom of the Press is for the benefit of *all* the people and not just those who have invested money in the publishing business.

The petition for rehearing is denied.

CARLTON, C.J., ROBERTS, ADKINS, McCAIN and DEKLE, JJ., and RAWLS, District Court Judge, Concur
BOYD, J., Dissents

APPENDIX C

TORNILLO v. MIAMI HERALD PUBLISHING CO.

No. 72-20199.

Circuit Court, Dade County.
October 20, 1972.
38 Fla. Supp 80

FRANCIS J. CHRISTIE, Circuit Judge.

Final judgment: Plaintiff, a candidate for the state legislature, demanded that the Miami Herald print verbatim his replies to two editorials in the Herald relating to his candidacy for public office. The Herald refused.

Plaintiff then brought this action for a mandatory injunction and for damages seeking to enforce §104.38, Florida Statutes, by a civil action. The editorials and plaintiff's replies are attached to the complaint. In view of the nature of the relief requested the court granted plaintiff's request for an emergency hearing on October 2, 1972.

Pursuant to §86.091, Florida Statutes, the attorney general was advised that the defendant intended to ask the court for a declaration that §104.38 was unconstitutional. The attorney general was served with a copy of the complaint and was represented at the hearing.

§104.38 is a criminal statute. Absent special circumstances equity will not enjoin the commission of a crime. Pompano Horse Club Co. v. State (1927), 93 Fla. 415, 111 So. 801, 52 A.L.R. 51; 17 Florida Jurisprudence, *Injunctions*, §46.

However, there is a more serious infirmity in plaintiff's case. The court is of the opinion that §104.38 violates Article I, §§4 and 9 of the Florida Constitution and the Fourteenth Amendment to the U. S. Constitution.

This question was considered in State v. News-Journal Corporation, 36 Fla. Supp. 164, a case filed in the county judge's court of Volusia County, Florida. In a carefully reasoned opinion dated February 14, 1972, Judge J. Robert Durden held §104.38 unconstitutional on two grounds—an infringement upon freedom of the press, and a denial of due process of law because the statute is too vague, indefinite and uncertain to constitute notice of what language may fall within its purview and what constitutes a reply which must be printed. The attorney general advised the court that he had elected not to appeal Judge Durden's decision on the ground that he also had the same reservations about the constitutionality of the statute.

This court concurs in Judge Durden's opinion. State statutes prohibiting or directing any type of publication, particularly upon pain of criminal sanction, are presumed unconstitutional unless it can be demonstrated that the infringement can be justified as required to protect a substantial public interest threatened by a clear and present danger. Near v. Minnesota, 283 U.S. 697 (1931); Thomas v. Collins, 323 U.S. 516, 530 (1945); Palko v. Connecticut, 302 U.S. 319, 327 (1937). The "priority" given First Amendment freedoms "gives these liberties a sanctity and a sanction not permitting dubious intrusions." Thomas v. Collins, supra at page 530. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963). The First

Amendment prohibits the government from restraining the publication even of top secret documents alleged to be vital to the national security. New York Times Co. v. United States, 403 U.S. 713 (1971).

Clearly if the state may not prohibit what a newspaper may print it cannot assume the editorial function and direct a newspaper what to print. By the First Amendment, "The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government." New York Times Co. v. United States, supra at page 717 (Justice Black concurring) (1971).

Since §104.38, Florida Statutes, so clearly reaches cases in which its restraint upon freedom of speech and press does not measure up to any permissible First Amendment standard the statute is void on its face.

Because of its broad intrusion into the area protected by the First Amendment, §104.38 also suffers from an additional infirmity—it is impermissibly vague and indefinite and this vagueness serves to restrict and stifle protected expression. No editor could know from the statute exactly what words would offend the statute or the scope of the reply intended to be mandated. A state may not enact such a broad statute and leave it to the courts, on a case by case basis, to determine the constitutionality of its application to various circumstances. To do so places a citizen in an untenable position of foregoing his protected liber-

ties, or risking criminal prosecution. This dilemma itself impermissibly restricts free expression. Smith v. Cahoon, 283 U.S. 564 (1931).

> "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." Ashton v. Kentucky, 384 U.S. 195, 200 (1966).

The strict standards of overbreadth and vagueness in First Amendment cases are even stricter where a statute provides criminal sanctions. "The standard for certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanctions for enforcement." Winters v. New York, supra at page 515.

The attorney general advised the court at the bearing (sic) that his opinion as to the unconstitutionality of this statute had not changed since State v. News-Journal Corporation, supra, and therefore he did not elect to intervene to defend the statute.

Plaintiff stated that if the court found the statute on which this suit is based unconstitutional he did not desire to take further proceedings in this court and requested that his suit be dismissed with prejudice.

Accordingly, confirming the court's oral ruling made at the conclusion of the hearing, this cause is dismissed with prejudice at plaintiff's cost.

APPENDIX D

IN THE SUPREME COURT OF FLORIDA

CASE NO. 43,009

PAT L. TORNILLO, JR.,

Appellant,

vs.

THE MIAMI HERALD PUBLISHING COMPANY,
a Division of Knight Newspapers, Inc.,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The Miami Herald Publishing Company, a division of Knight Newspapers, Inc., Appellee in this case, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Florida upholding the constitutionality of Section 104.38, Florida Statutes, which was entered in this action on July 18, 1973 and adhered to upon Petition for Rehearing on October 10, 1973.

This Appeal is taken pursuant to 28 U.S.C. §1257(2).

PAUL & THOMPSON

/s/ Dan Paul

Dan Paul

/s/ James W. Beasley, Jr.

James W. Beasley, Jr.
Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Notice of Appeal to the Supreme Court of the United States were served by mail upon the following this 30th day of October, 1973:

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/s/ James W. Beasley, Jr.

APPENDIX E

FLORIDA STATUTES

97.021 Definitions

The following words and phrases when used in this code shall be construed:

(1) "Primary election" means election held preceding the general election, for the purpose of nominating a party nominee to be voted for in the general election to fill a national, state or county office. The first primary is a nomination or elimination election, the second primary is a nominating election only.

(2) "Special primary election" is a special called nomination election designated by the governor, for the purpose of nominating a party nominee to be voted on in a general or special general election.

(3) "General election" means an election held on the first Tuesday after the first Monday in November in the even numbered years, for the purpose of filling national, state and county offices and for voting on constitutional amendments as proposed by the legislature.

(4) "Special general election" is a special called election for the purpose of voting on a party nominee to fill a vacancy in the national, state or county office.

* * * *

(18) "Candidate" shall mean any person who has filed his qualification papers, and paid his qualifying fees as required by law.

770.02 Correction, apology, or retraction by newspaper

If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case shall recover only actual damages.

775.082 Penalties for felonies and misdemeanors

* * * *

(5) A person who has been convicted of a designated misdemeanor may be sentenced as follows:

(a) For a misdemeanor of the first degree, by a definite term of imprisonment in the county jail not exceeding 1 year;

(b) For a misdemeanor of the second degree, by a definite term of imprisonment in the county jail not exceeding 60 days.

(6) Nothing in this section shall be construed to alter the operation of any statute of this state authorizing a trial court, in its discretion, to impose a sentence of imprisonment for an indeterminate period within minimum and maximum limits as provided by law.

775.083 Fine in lieu of or in addition to other criminal penalty

A person who has been convicted of a crime, other than a capital felony, may be sentenced, when specifically designated by statute, to pay a fine in lieu of or in addition to any punishment described in § 775.082. Fines for designated crimes shall not exceed:

(1) $10,000, when the conviction is of a felony of the first or second degree;

(2) $5,000, when the conviction is of a felony of the third degree;

(3) $1,000, when the conviction is of a misdemeanor of the first degree;

(4) $500, when the conviction is of a misdemeanor of the second degree;

(5) Any higher amount equal to double the pecuniary gain derived from the offense by the offender or double the pecuniary loss suffered by the victim.

(6) Any higher amount specifically authorized by statute.

APPENDIX F

THE MIAMI HERALD

September 20, 1972

The State's Laws And Pat Tornillo

LOOK who's upholding the law!

Pat Tornillo, boss of the Classroom Teachers Association and candidate for the State Legislature in the Oct. 3 runoff election, has denounced his opponent as lacking "the knowledge to be a legislator, as evidenced by his failure to file a list of contributions to and expenditures of his campaign as required by law."

Czar Tornillo calls "violation of this law inexcusable."

This is the same Pat Tornillo who led the CTA strike from February 19 to March 11, 1968, against the school children and taxpayers of Dade County. Call it whatever you will, it was an illegal act against the public interest and clearly prohibited by the statutes.

We cannot say it would be illegal but certainly it would be inexcusable of the voters if they sent Pat Tornillo to Tallahassee to occupy the seat for District 103 in the House of Representatives.

APPENDIX G

THE MIAMI HERALD

September 29, 1972

FROM the people who brought you this—the teacher strike of '68—come now instructions on how to vote for responsible government, i.e., against Crutcher Harrison and Ethel Beckham, for Pat Tornillo. The tracts and blurbs and bumper stickers pile up daily in teachers' school mailboxes amidst continuing pouts that the School Board should be delivering all this at your expense. The screeds say the strike is not an issue. We say maybe it wouldn't be were it not a part of a continuation of disregard of any and all laws the CTA might find aggravating. Whether in defiance of zoning laws at CTA Towers, contracts and laws during the strike, or more recently state prohibitions against soliciting campaign funds amongst teachers, CTA says fie and try and sue us—what's good for CTA is good for CTA and that is natural law. Tornillo's law, maybe. For years now he has been kicking the public shin to call attention to his shakedown statesmanship. He and whichever acerbic prexy is in alleged office have always felt their private ventures so chock-full of public weal that we should leap at the chance to nab the tab, be it half the Glorious Leader's salary or the dues checkoff or anything else except perhaps mileage on the staff hydrofoil. Give him public office, says Pat, and he will no doubt live by the Golden Rule. Our translation reads that as more gold and more rule.

APPENDIX H

FROM: Pat L. Tornillo, Jr.,
CTA Executive Director,
and Candidate (Dem.) for
State Rep., Dist. 103
1809 Brickell Avenue
Miami, Florida 33129
Phone: 854-0220

September 30, 1972

EDITORIAL REPLY

Since the *Herald* has chosen to publicly attack my record, accomplishments, and positions on various issues, and those of the CTA, I again request that under Florida Statue 104.38, the *Herald* print the following record of affirmative and legal action.

In 1968, CTA signed a no-strike affidavit.

In 1969, CTA filed and won a suit in the Supreme Court of Florida, which gives all public employees the right to bargain collectively without the right to strike.

In 1971, CTA filed the Tornillo suit, which enabled the School Board to receive $7.6 million and are presently cooperating with the Board in their effort to retain this money and avoid further financial chaos.

Since 1968, CTA has reimbursed the taxpayers of Dade County for the full salary and all fringe benefits of its president.

Since 1970, CTA has not used the school mail service to communicate with its members.

Since 1970, CTA has paid all costs of payroll deduction of dues for its members.

We have attempted to obey all the laws of the state, not intentionally violating any, while continuing our efforts to alert the public to the impending financial crisis facing the schools.

We have, however, also retained our belief in the right of public employees to engage in political activity and to support the candidates of our choice, as is the right of any citizen in this great country of ours.

Aye, there's the rub.

• • • •

APPENDIX I

STATE v. NEWS-JOURNAL CORPORATION.

Docket 64, Page 2438.

County Judge's Court, Volusia County.

February 14, 1972.

36 Fla.Supp. 164

ROBERT DURDEN, County Judge.

This cause came on to be heard on defendant's motion to dismiss on January 21, 1972. At said hearing, the court received a stipulated statement of facts and heard argument by the Volusia County Prosecutor and counsel for defendant.

Stipulated facts

The News-Journal Corporation is a Florida Corporation which publishes the Daytona Beach Morning Journal, a daily newspaper published in Volusia County. On September 29, 1971, there was published in the Daytona Beach Morning Journal a political article written by the News-Journal political editor, Ray Ruester, entitled *Kane's City Hall Power Grab*. The subject of the article was the incumbent mayor, Richard Kane, and his alleged attempts to create a strong mayor government for the city which, by charter, has a commission manager form of government.

By a letter dated September 29, 1971, addressed to the editor, News-Journal Corporation, Richard Kane requested that pursuant to §104.38, Florida Statutes, the News-Journal Corporation immediately publish a reply to the column. The material which Mayor Kane sought to have published as his reply was attached to his letter to the editor and consisted of an article written by Richard Kane and previously published in the Halifax Reporter, a newspaper published in Volusia County, on September 4, 1971.

The News-Journal Corporation refused to publish the material as requested. Mayor Kane thereafter signed an affidavit and caused a warrant to be issued for the News-Journal Corporation for violation of §104.38, Florida Statutes.

The News-Journal Corporation filed its motion to dismiss contending, inter alia, that §104.38 is unconstitutional under article 1, §4, of the constitution of Florida, and the first and fourteenth amendments to the constitution of the United States.

Decision

§104.38, Florida Statutes, provides as follows—

> If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candi-

> date immediately publish free of costs any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall, upon conviction, be guilty of a misdemeanor.

The defendant in its motion to dismiss contends that the above-quoted statute is unconstitutional. This court agrees with the defendant for the reasons as stated herein.

First, this court recognizes that the intent of the above-quoted statute is to regulate the press which is protected by the first amendment to the United States Constitution and article 1, §4, of the Florida Constitution. The cases limiting restraint of the free press are numerous. The case of the New York Times Company v. Sullivan, 376 U.S. 254 (1964), is recognized as one of the landmark decisions in dealing with the question of freedom of the press. Mr. Justice Brennan, rendering the opinion of the court in that case, stated —

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484, 1 L.ed. 2d 1498, 1506, 77 S.Ct. 1304. The maintenance of the opportunity for free political discussion to the

> end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the republic, is a fundamental principle of the constitutional system.

Applying the rule of law as set forth therein it is the opinion of this court that the statute in question imposes an unconstitutional infringement upon the freedom of the press.

Second, it should be recognized that the statute in question is a criminal statute, the violation of which is punishable by fine or imprisonment. It is a well settled rule of law of this state, and of all other states, that a criminal statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. Cramp v. Board of Public Instruction of Orange County, Florida, 368 U.S. 278; Aztec Motel, Inc. v. State, ex rel. Faircloth, 251 So.2d 849 (Florida Supreme Court, 1971); Burstyn, Inc. v. Wilson, 343 U.S. 495 (1951).

This court is of the opinion that the language of the statute in question is too vague, indefinite and uncertain to constitute notice of what language may fall within the purview of the statute and what constitutes a reply which must be printed at the request of candidates. This court is of the opinion that this statute is not reasonably definite and certain and that the constitutional requirement of definiteness is violated in that this statute fails to give a person of ordinary intelligence fair notice of its violation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Jurisdictional Statement were served this 19th day of November, 1973, by personal delivery, upon Mr. Tobias Simon, Attorney for Appellee, 1492 South Miami Avenue, Miami, Florida 33130.

JAMES W. BEASLEY, JR.

James W. Beasley, Jr.

Supreme Court, U. S.
FILED
NOV 19 1973
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY a Division of KNIGHT NEWSPAPERS, INC.,

Petitioner,

vs.

PAT L. TORNILLO, JR.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR NEW YORK NEWS INC. AS *AMICUS CURIAE*

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In The

Supreme Court of the United States

October Term, 1973

No. 73

THE MIAMI HERALD PUBLISHING COMPANY,
a division of Knight Newspapers, Inc.,

Petitioner,

vs.

PAT L. TORNILLO, JR.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

BRIEF OF NEW YORK NEWS INC. AS AMICUS CURIAE

The New York News Inc. ("The News") owner and publisher of the nation's largest mass circulation newspapers, The New York Daily and Sunday News, with the consent of the parties pursuant to Rule 42 of this Court, respectfully submits this brief in support of petitioner Miami Herald's petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

This action involves the constitutionality of a Florida Statute Section 104.38 Fla. Stat. ("Section 104.38") which provides:

> F.S. Section 104.38 — Newspaper assailing candidate in an election; space for reply. — If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may

> make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in Section 775.082 or Section 775.083.

Petitioner's brief to the Florida Supreme Court presented a thorough exposition of the facts and well reasoned arguments with supporting authorities. The News will not here repeat petitioner's presentation but will summarize the propositions that should be controlling.

1. Where First Amendment freedoms are at stake the requirements of statutory definiteness must be strictly enforced so that no improper applications of the statute may be made which deter the press from the free exercise of First Amendment rights: *Ashton v. Kentucky*, 384 U.S. 195 (1966); *NAACP v. Button*, 371 U.S. 415 (1963). With reference to this proposition and to Section 104.38, Florida County Court Judge J. Robert Durdon stated:

> "In the opinion of this Court, it takes little imagination to foresee the susceptibility of 'sweeping and improper application' of the statute in question" *State of Florida v. News-Journal Corp.*, (County Judge's Court for Volusia County, 1972).

2. Section 104.38 is unconstitutionally vague so as to be violative of the Due Process clause of the Fourteenth Amendment of the United States Constitution. An editor of a newspaper, cognizant of the criminal sanctions of Section 104.38, will frequently be faced with a distressing and burdensome dilemma that should not be imposed on the press.

3. The leading First Amendment scholar, Z. Chafee succinctly states the case:

> "[L]iberty of the press is in peril as soon as the government tries to compel what is to get into a

newspaper" II Z. Chafee, Government and Mass Communications, 633 (1947).

Compelling a newspaper to publish articles and opinions contrary to its own views and against its own will is governmental censorship of the most direct kind. As was recently said by Judge Wright of the 9th Circuit, "There is no difference between compelling publication of material that the newspaper wishes not to print and prohibiting a newspaper from printing news or other material." *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 135 (9th Cir. 1971).

4. There is no First Amendment Right of an individual to commandeer privately owned presses to espouse his own views. Chief Justice Burger aptly stated this proposition in the recent decision in *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 124 (1973):

> "Nor can we accept the Court of Appeals view that every potential speaker is . . . the best judge of the merits of his or her views. All journalistic tradition and experience is to the contrary. For better or worse, editing is what editors are for; and editing is selection and choice of material."

The State must not be allowed to become the press' super-editor.

5. The courts have traditionally held that newspaper publishing constitutes free enterprise, free of state action or color of state involvement. Eg., *Chicago Joint Board, Amalgamated Clothing Workers v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970) and cases cited therein.

6. Contrary to respondent's argument, Section 104.38 will not achieve a wider dissemination of political opinions in the press. It is indeed far more likely to have the opposite effect, that is, to have a "chilling effect" on public discussion that will discourage a publisher from expressing political opinion or publishing news accounts,

to which the statute may be claimed to be applicable. Under Section 104.38 a publisher will be faced with the unenviable options of involuntarily turning his paper's columns over to any politician running for a local, state, or national office who may claim that he had been "attacked" by the publications or, alternatively, the publisher will be subject to criminal penalties. The third and a likely, option that may be exercised, is that publishers will seek to avoid political controversy and will self-censor the newspaper so as to avoid claims under the statute. Section 104.38 can only serve to deter the press from voicing criticism of public officials and to undermine the press' role in the "national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). Self-censorship compelled by the State cannot be allowed to suppress speech the State could not suppress directly. *Smith v. California*, 361 U.S. 147 (1959).

7. Section 104.38 is unconstitutional both as a direct restraint on the freedom of the press, and for the "chilling effect" it will have on the press' exercise of that freedom.

8. The press throughout this country were gravely concerned by the Florida Supreme Court's upholding the constitutionality of Section 104.38. After the Florida Supreme Court announced its decision, the "New York Daily News" editorialized in its July 20, 1973 issue:

> "Carried to its logical conclusion, the verdict would expose newspapers to endless harassment by politicians and just about everyone else who differed with them on any issue."

9. Clayton Kilpatrick, editor of the "Chicago Tribune" is quoted in the July 28, 1973, issue of "Editor & Publisher" at page 9:

> "Anytime a newspaper is forced to publish an order, there is the risk that people who are pushing the buttons will control the product."

Reasons for Granting the Writ

10. Similarly, the "New York Times" in its July 22, 1973 issue termed the Florida decision "shocking" and, with particular reference to the vagueness of the statute, asked:

> "Would an incumbent governor or legislator or President be free to demand that he be allowed to answer every critical editorial comment on his acts and policies in office? Would every rebuttal by a newspaper then entitle the official to a counter rebuttal? Could the editor be legally challenged if he declined to print the reply in full, no matter how much of it might be irrelevant campaign harangue — and would the editor be told by the court how prominently the reply had to be printed in order to insure equality?"

11. The press considers the issue to be resolved in this case to be of historic significance, not only in its own interest but in the interest of the public. Section 104.38 may serve as a prototype for similar legislation in other states. Unless this Court declares the statute unconstitutional other legislatures, under the mistaken belief that they are promoting the causes of free public debate and discussion in the press, will in fact vitiate this nations' press' traditional and robust ability to do so.

WHEREFORE, The News prays this Court grant *certiorari* in this case and find Section 104.38 Fla. Stat. unconstitutional as violative of the First and Fourteenth Amendments of the United States Constitution.

Respectfully submitted,

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November 12, 1973

MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of Knight Newspapers, Inc.,

Appellant,

v.

PAT L. TORNILLO, JR.,

Appellee.

On Appeal from the
Supreme Court of Florida

BRIEF OF DOW JONES & COMPANY, INC. AND THE NEW YORK TIMES COMPANY, AS AMICI CURIAE, IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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In The

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STATEMENT

Dow Jones & Company, Inc., a Delaware corporation, and The New York Times Company, a New York corporation, pursuant to the written consent of both parties to this action, hereby submit this Joint Brief, as *amici curiae,* in support of the appellant's jurisdictional statement. This brief is being filed because the *amici* believe that the opinion of the Supreme Court of Florida in the case being appealed countenances a serious encroachment upon constitutionally guaranteed rights of freedom of the press.

INTEREST OF THE AMICI

Dow Jones & Company, Inc. is the publisher of, inter alia, *The Wall Street Journal*, a general newspaper emphasizing matters affecting business and finance, with a nationwide daily circulation in excess of 1,250,000; *The National Observer*, a general weekly newspaper with a national circulation of over 500,000; the Ottaway Newspapers, twelve independently edited local newspapers in six states with combined daily circulation in excess of 250,000; and *Barron's National Business and Financial Weekly*, a magazine concentrating on material of interest to the business and financial community, having a weekly circulation of about 200,000.

The New York Times Company is the publisher of *The New York Times*, a daily newspaper with nationwide distribution and with a daily circulation of about 850,000 and a Sunday circulation of about 1,500,000. In addition, the New York Times owns ~~eleven~~ seven newspapers in the State of Florida, with a combined total circulation of about 110,000.

The *amici* are thus two of the broadest and largest publishers of printed media in the United States. They are each convinced that the decision of the Supreme Court of Florida, if allowed to stand by this Court, will sharply curtail the discussion by newspapers of political and governmental affairs in the State of Florida, and will permit and encourage governmental regulation of the content of printed media to a degree totally inimical to rights guaranteed under the First and Fourteenth Amendments of the Constitution of the United States.

ARGUMENT

Florida Statute § 104.38, held constitutional by the Florida Supreme Court in this case, provides in substance that if "any newspaper in its columns assails the personal character" of a candidate or charges him with "malfeasance

or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose," the newspaper must upon request "publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to." The Florida Supreme Court reasoned that since the statute encourages, rather than limits, the "robust dissemination of ideas and counterthought" which is an object of the First Amendment guarantees it is therefore constitutional. But careful consideration of the implications of the statute strongly suggests that the result of the statute's enforcement will in fact be, to the contrary, a sharp limitation on the transmission by the press of information and opinion about Florida politics and government.

The scope of the Florida statute is ambiguous; whether, for example, it applies to news "columns" or only to editorial "columns" is unclear. Regardless of its interpretation, however, if the Florida statute is finally determined to be valid, every Florida newspaper editor will be required to pause before publishing material concerning any political personage who may be deemed to be a "candidate." He will necessarily consider each sentence, each phrase, each implication, in an attempt to divine whether a court might construe the language to be "assailing" the candidate's character or charging him with misfeasance or malfeasance. Every politically-oriented editorial or letter to the editor will be published with the fear that, as a result of its publication, part of the content of tomorrow's editorial page will be dictated by a politician seeking office. Every page-one story about legislators or other elected officials may carry with it the possibility that the legislator or official will be the author of a portion of a future front page. It is painfully clear that those conditions will lead not to debate, but to a stifling degree of restraint in political reporting by newspapers. Such government-caused self-censorship, particularly in the area of expression about

government and politics, is plainly unconstitutional in its effect. *See, e.g., Rosenbloom* v. *Metromedia*, 403 U.S. 29, 52-53 (1971); *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964).

The *amici* respectfully submit that the error of the Supreme Court of Florida is fundamental and goes beyond its holding with respect to the onerous requirements of this particular Florida statute. The very core of the First Amendment protection of the press is that the government may not forbid a member of the press to publish what it believes should be published, and may never force a member of the press to publish what it concludes should not be published. If it is constitutional for a legislature or court in the "public interest" to tell the press what kinds of election news it must publish, what is to prevent such bodies from dictating what must be published in other public or political areas and thus, what "freedom" to publish will remain? The legislature and Supreme Court of Florida have told the Miami Herald that it must publish the appellee's statement; this the First and Fourteenth Amendments forbid them to do.

The Florida court's holding is contrary to the recent decisions of other American courts. In *Associates & Aldrich Co.* v. *Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971), the Court of Appeals held that the defendant was not required to carry an advertisement for a motion picture where the newspaper disapproved of the text of the ad. The court said:

> "Appellant has not convinced us that the courts or any other governmental agency should dictate the contents of a newspaper." 440 F.2d at 135.

In *Chicago Joint Bd., Amal. Cloth. Wkrs.* v. *Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), the Court of Appeals held that newspapers were not required to take advertising explaining a union's position with respect to the

sale of imported clothing by a large department store. Quoting the District Court, the Seventh Circuit said:

> "'[T]he function of the press from the days the Constitution was written to the present time has never been conceived as anything but a private enterprise, free and independent of government control and supervision. Rather than state power and participation pervading the operation of the press, the news media and the government have had a history of disassociation.'" 435 F.2d at 474.

Four months ago, the Supreme Judicial Court of Massachusetts, in an advisory opinion to the State legislature, held that a proposed statute requiring newspapers that publish advertisements for political candidates to publish paid advertisements for competing candidates would be unconstitutional. *Opinion of the Justices,* Mass. (July 13, 1973). The court observed that the proposed legislation

> "presents a paradox because its enactment, instead of achieving a fairer dissemination of political advertising, may produce the chilling effect of discouraging newspapers and other affected publications from accepting any political advertisements. A newspaper or other publication of general circulation may decide to publish no political advertisements on an election issue rather than expose itself to a commitment to publish all responsive advertisements." Opinion at 11.

The Court concluded that the statute was unconstitutional because the

> "compulsion to publish all responsive political advertisements, applicable to all newspapers and other publications of general circulation in the Commonwealth, goes beyond what is essential to the furtherance of any interest of a State in its citizens having a right of access

to newspapers in order to express, at their expense, political ideas which otherwise would not be published. . . . Indeed, no set of circumstances may exist which would support a legislative mandate that a newspaper or other publication of general circulation must publish a political advertisement." Opinion at 14-15.

And last term, in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* U.S. , 36 L Ed 2d 772 (1973), Mr. Chief Justice Burger writing for this Court said:

> "The power of a privately owned newspaper to advance its own political, social and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers." 36 L Ed 2d at 792.

Also, see *Mills* v. *Alabama,* 384 U.S. 214 (1966), in which this Court underscored the constitutional right of newspapers to "urge people to vote one way or another in a publicly held election." 384 U.S. at 220.

The *amici* are committed to a system which fosters dissemination of expression by all elements of society. ~~Editorially,~~ they have published in the pages of their newspapers information from many sources and a multitude of viewpoints which vary from those held by their publishers and editors. But while they believe in the robust debate of which the Florida court speaks, they are convinced that in the long run the heavy hand of the government will stifle, not encourage, such discourse.

The predicate to obtaining and protecting free and open discussion of matters of legitimate public interest and concern, as recognized in the opinions referred to above, is the prohibition of federal and state governments from ordering what shall be published by the press. The writers of

our Constitution explicitly recognized this when they chose, as their sole means of insuring a system based upon the free exchange of ideas, the command:

> "Congress shall make no law . . . abridging the freedom . . . of the press . . . ."

The rampart between the press and the overwhelming powers of government must not be breached. Once the government is within the gates, no matter what its motivation or pretext, it may never be removed.

CONCLUSION

It is respectfully urged that this Court enter an order noting probable jurisdiction so that it can fully examine the serious constitutional questions raised by the decision of the Florida Supreme Court.

Respectfully submitted,

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November 19, 1973

IN THE

Supreme Court of the United States

NOV 29 1973

October Term, 1973
No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY, a division of KNIGHT NEWSPAPERS, INC.,

Appellant,

vs.

PAT L. TORNILLO, JR.,

Appellee.

On Appeal From the Supreme Court of Florida.

Brief of The Times Mirror Company, Amicus Curiae, in Support of Jurisdictional Statement.

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY, a division of KNIGHT NEWSPAPERS, INC.,

Appellant,

vs.

PAT L. TORNILLO, JR.,

Appellee.

On Appeal From the Supreme Court of Florida.

Brief of The Times Mirror Company, Amicus Curiae, in Support of Jurisdictional Statement.

The Times Mirror Company ("Times Mirror") presents this brief as *amicus curiae*, by consent of both appellant and appellee, in support of the jurisdictional statement filed by appellant The Miami Herald Publishing Company ("*The Miami Herald*"). Times Mirror's vital interest in these proceedings stems from its publication of the *Los Angeles Times*, a privately owned metropolitan newspaper of general circulation, as well as the fact that wholly-owned subsidiaries of Times Mirror publish two metropolitan newspapers of general circulation, *Newsday* (Long Island, New York) and *The Dallas Times Herald* (Dallas, Texas) and a community newspaper, *Orange Coast Daily Pilot* (Costa Mesa, California).

Times Mirror has previously fought for the right of private newspapers to be free from governmentally forced publication and prevailed in the case of *Associates & Aldrich Company v. Times Mirror Company* (9th Cir. 1971), 440 F.2d 133.

Opinions Below.

The initial opinion of the Florida Supreme Court dated July 18, 1973 and the opinion denying rehearing dated October 10, 1973 have not been reported as of the date of preparation of this brief. The opinion of the Circuit Court of Dade County, reversed by the Florida Supreme Court, is reported at 38 Fla. Supp. 80 (1973). Copies of the three opinions are attached as appendices to the Jurisdictional Statement filed by appellant.[1]

Jurisdiction.

The decision of the Florida Supreme Court sustained the constitutionality of Section 104.38, Florida Statutes, which *The Miami Herald* had contended to be in violation of the First and Fourteenth Amendments to the United States Constitution. The decision of the Florida Supreme Court was dated July 18, 1973; a duly presented Petition for Rehearing was denied by the Supreme Court of Florida on October 10, 1973. *The Miami Herald* filed a Notice of Appeal to this Court on November 1, 1973 pursuant to the provisions of Title 28, U.S.C. § 1257, subsection (2). [App. 35-9.]

It is respectfully submitted that this Court should note probable jurisdiction because:

(1) The decision of the Supreme Court of Florida conflicts with recent decisions of this Court (*Columbia*

[1]App. 1, 25 and 31.

Broadcasting System v. Democratic National Committee, ... U.S. ...., 36 L.Ed.2d 772; *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, ... U.S. ....., 37 L.Ed.2d 699; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367);

(2) The decision of the Supreme Court of Florida conflicts with directly controlling decisions of the United States Courts of Appeals (*Associates & Aldrich Company v. Times Mirror Company* (9th Cir. 1971), 440 F.2d 133; *Chicago Joint Board, Amal. Cloth. Workers v. Chicago Tribune Co.* (7th Cir. 1970), 435 F.2d 470, *cert. den.* 402 U.S. 973);

(3) The decision of the Supreme Court of Florida conflicts with the holding of the three-judge Federal District Court in *Resident Participation of Denver, Inc. v. Love* (D. Colo. 1971), 322 F.Supp. 1100; and

(4) The decision of the Supreme Court of Florida conflicts with the thoughtful opinion of the Supreme Judicial Court of Massachusetts in *Opinion of the Justices to the Senate* (1973), ... Mass. ....., 298 N.E. 2d 829.

Question Presented.

Is a state statute imposing criminal sanctions upon the refusal of a private newspaper to publish "free of cost any reply" submitted to it by any political candidate to an article published by the newspaper which "assails [his] personal character" or charges him with "malfeasance or misfeasance in office" or "otherwise attacks his official record" violative of the free press and due process clauses of the United States Constitution?

Constitutional Provisions Involved.

The First Amendment to the United States Constitution provides, in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Section 1 of the Fourteenth Amendment states, in part:

> "* * * No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Statutes Involved.

Section 104.38, Florida Statutes, a part of the Florida Election Code, provides:

> "§104.38 Newspaper assailing candidate in an election; space for reply.—If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083."

Sections 775.082 and 775.083, stating the criminal sanctions for commission of a misdemeanor of the first

degree, are reproduced as appendices to the Jurisdictional Statement.[2]

Statement.

In the fall of 1972, appellee Tornillo was a candidate for the Democratic Party nomination for a seat in the Florida House of Representatives. On September 20, 1972 and September 29, 1972, *The Miami Herald* published editorials unfavorably commenting upon Tornillo's candidacy.[3]

On September 30, 1972, Tornillo requested *The Miami Herald* to print a statement submitted by him in reply to the published editorials.[4]

On October 1, 1972, Tornillo filed a civil action in the Eleventh Judicial Circuit seeking to require *The Miami Herald* to publish his reply pursuant to the provisions of Section 104.38 and further seeking recovery of damages for the failure of the newspaper to publish his statement. The Circuit Court dismissed the case with prejudice, holding that Section 104.38 was (i) void as an impermissible restriction upon freedom of speech and press in violation of the First and Fourteenth Amendments to the United States Constitution and (ii) void as an unlawfully vague and ambiguous criminal statute denying *The Miami Herald* due process of law under the Fourteenth Amendment.[5]

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[2]App. 42-3. The sections provide for a punishment of imprisonment not to exceed one year or a fine not to exceed $1,000. Although the Supreme Court of Florida interpreted Section 104.38 as providing for civil as well as criminal enforcement (App. 27), civil sanctions impeding free speech are subject to the same heavy burden of justification. (*New York Times Co. v. Sullivan*, 376 U.S. 254, 265, 277.)

[3]App. 45 and 47.

[4]App. 49-50.

[5]App. 31.

Tornillo appealed the judgment of the Circuit Court directly to the Supreme Court of Florida. On July 18, 1973, that Court issued a decision reversing the Circuit Court and holding that Section 104.38 does not violate the United States Constitution.[6] A petition for rehearing was denied.[7]

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[6]App. 1.
[7]App. 25.

ARGUMENT.

In the name of assuring fair elections, the State of Florida has equated its private press to a governmentally-regulated community bulletin board obliged to display the unedited statements of political candidates whose "personal character" or "official record" has been impugned.

A fair election, the nominal goal of this right of reply legislation, is, of course, a laudable objective. Infringements upon a free press are usually attempted in the name of such desired ends as national security,[8] protection of personal reputation,[9] preservation of tranquility,[10] community morality[11] and fair housing for all races.[12]

Thus the Supreme Court of Florida provides the assurance that Section 104.38 "was enacted not to punish, coerce or censor the press but rather as a part of a centuries old legislative task of *maintaining conditions conducive to free and fair elections*. . . . To assure fairness in campaigns, the assailed candidate had to be provided an equivalent opportunity to respond; otherwise not only the candidate would be hurt *but also* the people would be deprived of both sides of the controversy." [App. 5.] According to that Court, the "statute *assures*, and *does not abridge*, the right of expression which the First Amendment guarantees. The

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[8]*New York Times Co. v. United States*, 403 U.S. 713.

[9]*New York Times Co. v. Sullivan*, 376 U.S. 254.

[10]*Brandenburg v. Ohio*, 395 U.S. 444; *Cohen v. California*, 403 U.S. 15; *Edwards v. South Carolina*, 372 U.S. 229.

[11]*Winters v. New York*, 333 U.S. 507; *Kingsley Films v. Regents*, 360 U.S. 684; *Interstate Circuit v. Dallas*, 390 U.S. 676; *Stanley v. Georgia*, 394 U.S. 557.

[12]*Organization for a Better Austin v. Keefe*, 402 U.S. 415.

statute supports the freedom of the press in its true meaning—that is, the right of the reader to the whole story, rather than half of it—and without which the reader would be 'blacked out' as to the other side of the controversy." [App. 18.]

The reversal of traditional free speech protections is covered with a scholarly patina supplied by Jerome A. Barron, one of counsel for appellee Tornillo. He has explained in the Harvard Law Review that preservation of a "true marketplace of ideas" compels abandoning the "romantic view" of the First Amendment and imposing governmental intervention upon editorial judgment in order to assure free access of the public to the means of mass communication.[13]

Although Florida has chosen to adopt this destruction of free speech in order to save it, no such drastic alteration of federal constitutional rights may be sanctioned.

1. The Burden of Justification Imposed Upon Regulation of Speech Is Heavy.

This Court throughout the 20th century has undertaken a primary responsibility of insuring that government does not interfere with publication by the press absent a compelling showing of dire public necessity.[14] Whether or not couched in terms of a "clear and present danger,"[15] the burden of justification imposed

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[13]Barron, *Access to the Press—A New First Amendment Right*, 80 Harv.L.Rev. 1641 (1967).

[14]*Schenck v. United States*, 249 U.S. 47; *Papish v. University of Missouri*, 409 U.S. 667.

[15]*Brandenburg v. Ohio*, 395 U.S. 444, 451-7 (Douglas, J.); Frantz, *The First Amendment in the Balance*, 71 Yale L.J. 1424 (1962); Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 Colum.L.Rev. 313, 330 (1952).

upon regulation of speech is heavy. (*New York Times Co. v. United States*, 403 U.S. 713, 714.) If this is, as Barron asserts, a "romantic" view of the First Amendment, it is nonetheless one thoroughly ingrained in the law of the land.

2. Compelled Speech Is as Invidious as Censored Speech.

Governmental action *compelling* speech is equally invidious to the state's activities in *restricting* speech. Although the usual attack upon freedom of speech and press is in the form of prohibiting publication, "[t]here is no difference between compelling publication of material that the newspaper wishes not to print and prohibiting a newspaper from printing news or other material." (*Associates & Aldrich Company v. Times Mirror Company* (9th Cir. 1971), 440 F.2d 133, 135; *Chicago Joint Board, Amal. Cloth. Workers v. Chicago Tribune Co.* (7th Cir. 1970), 435 F.2d 470, 478, *cert. den.* 402 U.S. 973; see *Avins v. State University of New Jersey* (3d Cir. 1967), 385 F.2d 151, 152-154, *cert. den.* 390 U.S. 520; Chafee, *Government and Mass Communications*, 633 (1947).) The proposition is surely self-evident. A virtually universal feature of totalitarian regimes is the Ministry of Information which directs the publication of news in a form favored by the state.[16]

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[16]A chilling example is the era of Nazi Germany. Daily press directives presented in exquisite detail governmental requirements for the presentation of news, down to specifying the obligatory press reaction to the Duke of Windsor's wedding. (Grunberger, *The 12-Year Reich, A Social History of Nazi Germany 1933-1945*, 395 *et seq.* (1971).) The inevitable deterioration of the quality of the press under such circumstances is illustrated by the author's notation that "[q]uite a few practising journalists, actual-

(This footnote is continued on next page)

3. The Florida Statute Inevitably Will Require Intervention in Editorial Decisions.

Government intervention is an indispensable adjunct of the administration of Section 104.38. In thrusting aside *The Miami Herald's* claim of unconstitutional vagueness, the Supreme Court of Florida construed the statutory right to require the publication of "any reply" as referring only to a reply which is "wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane." [App. 16.]

One may imagine the extent of involvement of the Florida courts in making advance determinations of the extent to which the proposed reply is responsive, libelous, slanderous, vulgar or profane. Indeed, Professor

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ly, far from resenting the fact that their columns had become official notice-boards, welcomed Goebbels's scheme because it freed them from the burden of responsibility." (*Id.* at 395.)

Such intrusions upon freedom are customarily promulgated in the name of freedom itself. For example, the military junta in Peru enacted a "freedom of the press law" which included a requirement that each newspaper print in their entirety, on the first page, all official government communications. (*Los Angeles Times*, January 25, 1970, § A, at 16, cols. 1-2.)

A survey of the International Press Institute reported that "[c]ompelling newspapers to publish official handouts or any other material inspired by the government is certainly one of the worst abuses of power. It is current practice in totalitarian countries. In Spain, for example, papers are bound to publish material issued by the government, but have to pretend that it is put out by the newspaper office itself." Further examples are cited from Yugoslavia, Lebanon, Ecuador, Argentina and Colombia. (*Government Pressures on the Press*, IPI Survey No. 4, Zurich, 99-101 (1955).) A further IPI publication detailed the activities of totalitarian governments in the Soviet Union, East Germany and Spain in issuing press "directives" requiring the publication of government inspired news. (*The Press in Authoritarian Countries*, IPI Survey No. 5, Zurich, 23-25, 87-89, 143-145 (1959).)

Barron himself recognizes the indispensable role of the judiciary in actively regulating any governmentally-compelled right of access. He concedes that *someone* must have the right to edit the contents of a newspaper since "the daily press cannot be placed at the mercy of the collective vanity of the public."[17]

It is no aid to the constitutionality of Section 104.38 to note that Florida judges rather than a Florida administrative agency will be administering the governmental supervision of Florida's press. Courts are agencies of government whose actions are measured by the same constitutional standards as are applicable to the other branches. (*Shelley v. Kraemer*, 334 U.S. 1; *New York Times Co. v. Sullivan*, 376 U.S. 254; *Bursey v. United States* (9th Cir. 1972), 466 F.2d 1059, 1082-1083.) Accordingly, judicial restraints upon speech also carry the heavy burden of justification. (*New York Times Co. v. United States*, 403 U.S. 713, 714; *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419.)

4. The Private Press Is Not Subject to the "Fairness Doctrine" Imposed Upon the Broadcast Media.

We read two recent decisions by this Court as reaffirming a commitment to protect the press from government intrusion upon the selection of material for publication.

Although broadcast media are by technical necessity subject to the degree of governmental regulation implicit in the award of licenses to utilize scarce frequencies (*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-8, 400-01), such regulation does not

[17]Barron, *Access to the Press—A New First Amendment Right*, 80 Harv.L.Rev. 1641, at 1677 (1967).

include compelling radio or television stations to accept and broadcast editorial advertisements. (*Columbia Broadcasting System v. Democratic National Committee*, ... U.S. ...., 36 L.Ed.2d 772.) Mr. Chief Justice Burger's opinion, in part II concurred in by Mr. Justice Stewart and Mr. Justice Rehnquist, pointed out that "[t]he power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: First, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and second, the journalistic integrity of its editors and publishers." (36 L.Ed.2d at 792.) In part IV, for the Court, it was held that the Court of Appeals' imposition of a constitutional right of access to broadcast media was erroneous and constituted an unreasonable risk of governmental interference with the content of broadcast discussion of public issues. It was so held although "the use of a public source by the broadcast media permits a limited degree of Government surveillance, *as is not true with respect to private media*. . . ." (Emphasis added, 36 L.Ed.2d at 797.) Mr. Justice Douglas and Mr. Justice Stewart equated broadcast media to the private press insofar as the regulation of editorial content is concerned and rejected the constitutionality of government dictation of material to be broadcast or published. Even dissenters Mr. Justice Brennan and Mr. Justice Marshall, in footnote 12 to the opinion written by Mr. Justice Brennan, suggested that governmentally compelled publication of editorial ads in newspapers "would be impossible" and "would violate the First Amendment" because the "decision as to who shall operate newspapers is made in the free market, not by Government fiat." (36 L.Ed.2d at 829.) These

views render inappropriate the reliance of the Florida Court upon *Red Lion* and "fairness doctrine" applied by the FCC to broadcasters. [App. 10-12.]

In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, ... U.S. ...., 37 L.Ed.2d 669, Mr. Chief Justice Burger and Justices Douglas, Stewart and Blackmun dissented from a majority holding that it was constitutionally permissible for the City of Pittsburgh by ordinance to prevent the private press from listing help wanted advertisements under sexually segregated headings. The tenor of these dissents was that the Pittsburgh ordinance constituted an unconstitutional interference with the contents of a newspaper. The opinion of the majority relied upon the commercial character of the speech regulated and the underlying illegality of the sexual discrimination alleged to be fostered by the segregated ads. In its conclusion, the majority emphasized that nothing in the holding would be deemed to "authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial." (37 L.Ed.2d at 680.)

We recognize that it is chancy at best to attempt such a synthesis of cases involving the presentation of individual opinions, but *Columbia Broadcasting System* and *Pittsburgh Press* indicate to us a continued commitment to the untrammeled right of the private press, large and small, to determine the content of newspapers. The Supreme Judicial Court of Massachusetts recently shared this interpretation of *Columbia Broadcasting*

System and *Pittsburgh Press* in advising that proposed Massachusetts legislation requiring the publication of "reply" political advertising would violate the United States Constitution. (*Opinion of the Justices to the Senate* (1973), ... Mass. ....., 298 N.E.2d 829.)

5. The Florida Statute Will Inevitably Result in Self-Censorship.

The detrimental impact of Section 104.38 upon freedom of the press will be not only the direct intervention of government in editorial decisions, but also the chill of self-censorship. Publications considering a controversial article respecting a political candidate will perforce weigh the desire to publish against the risk of being forced to speak, verbatim, the words of others. The impetus to silence from such an eventuality is itself unconstitutional interference with freedom of speech and press. (*New York Times Co. v. Sullivan*, 376 U.S. 254, 279; *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 461-3.)

6. The Size of The Miami Herald Is Irrelevant to Its Constitutional Rights.

The offhand reference of the Supreme Court of Florida to the fact that *The Miami Herald* is "the largest newspaper published in Florida" [App. 8-9] is irrelevant to its rights of free speech and press. No rational theory supports the proposition that large newspapers are less free than others. No case supports the proposition that a special category of the press exists which is subject to editorial dictation by govern-

ment. The Ninth and Seventh Circuits have expressly rejected the argument. (*Associates & Aldrich Company v. Times Mirror Company* (9th Cir. 1971), 440 F.2d 133, 134-6; *Chicago Joint Board, Amal. Cloth. Workers v. Chicago Tribune Company* (7th Cir. 1970), 435 F.2d 470, 474 and 478, *cert. den.* 402 U.S. 973; and see *Resident Participation of Denver, Inc. v. Love* (D. Colo. 1971), 322 F.Supp. 1100.) This Court has vigorously protected the freedom of the largest newspaper in the United States without regard to its dominance in, at the least, the area of its publication. (*New York Times Co. v. Sullivan*, 376 U.S. 254; *New York Times Co. v. United States*, 403 U.S. 713.)[18]

7. The Record Does Not Demonstrate Any Justification Sufficient to Sustain the Restraint Imposed by Section 104.38 Upon Free Speech and Press.

In the light of the foregoing principles, Section 104.38 cannot stand. There is nothing in the record to support the untenable proposition that elections in Florida are in imminent danger of collapse absent compelled publication of candidates' statements in newspapers. No effort has been made to show a "serious and immi-

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[18]Newspapers, in their business aspects, are concededly subject to economic regulation, including that pertaining to the formation of monopolies. (*Citizen Publishing Company v. United States*, 394 U.S. 131; *Lorain Journal Co. v. United States*, 342 U.S. 143; *Associated Press v. United States*, 326 U.S. 1.) Those decisions hardly support governmental regulation of editorial content; rather, each emphasizes the entirely separate nature of economic, business regulation which does not trench upon editorial freedom. (*Cf. Grosjean v. American Press Co.*, 297 U.S. 233.)

nent" threat to the electoral machinery (*Craig v. Harney*, 331 U.S. 367, 373) or that no less drastic means exist to deal with that threat short of interfering with the editorial judgments of the private press (*Sherbert v. Verner*, 374 U.S. 398, 407). No such demonstration is possible. (See *Mills v. Alabama*, 384 U.S. 214.)

The only justification seriously attempted to be advanced in support of the statute is the convoluted view of the First Amendment which supposes that government regulation of speech is the road to freedom.

8. The Florida Legislation Is Not a Mere Correction or Retraction Statute.

So-called "correction" or "retraction" statutes enacted in some of the states are inapposite to Section 104.38. Such statutes assume a false and libelous publication, actionable even in the light of the constitutional inhibitions upon defamation actions. The publisher is afforded the opportunity to correct in order to mitigate or eliminate damages he otherwise would be required to pay. (I Hanson, *Libel and Related Torts*, 149-161 (1969).) Far from constituting an infringement upon private editorial discretion, these statutes are legislative limitations upon the civil right of action for defamation and implement the concepts articulated in *New York Times Co. v. Sullivan*, 376 U.S. 254.

Conclusion.

The Florida Supreme Court reveals a disturbing sense of impatience and pique with the press. That Court, in surrendering news columns to political candidates desiring to issue government compelled and supervised replies, comments that the First Amendment is "not merely for a select few" and "did not create a privileged class" able to deny to the people freedom of expression [App. 9.] The Court wished it to "be remembered that First Amendment Freedom of the Press is for the benefit of *all* the people and not just those who have invested money in the publishing business." [App. 30.]

It may be that vesting untrammeled discretion in private editors and publishers to choose the words they would publish has not always produced the most profound or even the fairest speech. However, our commitment to this freedom has served us well for nearly 200 years. We know of no state utilizing government controls upon the press which can point to a more unfettered intercommunication of ideas or, for that matter, fairer elections.

All temptations to create a judicial or administrative "referee" to insure that the press properly approaches its task run head on into the reality that such a proposition is an "iridescent dream" predicated upon the naive assumption that it is the "splendid fellows in our crowd [who] will be exercising the large

powers over the flow of facts and opinions which seem to us essential to save society . . . ."[19]

If Florida's reach for utopia is undeterred by the sole body left with that opportunity, one may be sure that politicians across this country will hasten to employ the pages of private newspapers for their own purposes.

The nation will be the loser.

For the foregoing reasons, this Court should take jurisdiction and reverse the judgment of the Supreme Court of Florida.

Respectfully submitted,

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ROBERT S. WARREN,
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[19]Chafee, *Government and Mass Communications*, 709 (1947).

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY, a division of Knight Newspapers, Inc., *Appellant*,

v.

PAT L. TORNILLO, JR., *Appellee*.

On Appeal from the Supreme Court of Florida

BRIEF OF THE WASHINGTON POST COMPANY, AS AMICUS CURIAE, IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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Tornillo, Jr. v. The Miami Herald

Dear Mr. Cooper:

In response to your request, pursuant to Rule 42(1) of the Rules of the United States Supreme Court, on behalf of The Miami Herald, we hereby consent to the filing in that Court of an Amicus Curiae Brief in this case by the Washington Post Company.

Sincerely,

James W. Beasley

JWB:mh

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November 19, 1973

Richard Cooper, Esq.
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Re: Tornillo v. Miami Herald

Dear Mr. Cooper:

As counsel for the above captioned respondent, you are hereby given permission to file your brief amicus curiae on behalf of the Washington Post in the above captioned matter.

Very truly yours,

TOBIAS SIMON

TS:kk

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On Appeal from the Supreme Court of Florida

BRIEF OF THE WASHINGTON POST COMPANY, AS AMICUS CURIAE, IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

STATEMENT

The Washington Post Company, a Delaware corporation, submits this brief as amicus curiae in support of the appellant's jurisdictional statement, pursuant to Rule 42 of the Rules of this Court upon the written consent of both parties to this action. Copies of letters of consent from both parties have been filed with the Clerk. Amicus urges this Court to note probable jurisdiction because amicus believes that the statute upheld by the decision of the Florida

Supreme Court below is an unconstitutional direct attack on the freedom of the press.

INTEREST OF THE AMICUS

The Washington Post Company is the publisher of *The Washington Post*, a daily newspaper, published in the Nation's capital. In addition, The Washington Post Company is the parent of subsidiary corporations including Post-Newsweek stations which operate WPLG-TV in Miami, Florida and WJXT-TV in Jacksonville, Florida. The Washington Post Company through a subsidiary also publishes *Newsweek*, a nationally and internationally distributed news magazine.

ARGUMENT

I. THE DECISION BELOW HOLDING FLORIDA STATUTE § 104.38 CONSTITUTIONAL IS UNPRECEDENTED AND CONTRARY TO SETTLED AUTHORITY.

A. The Decision Below Is Contrary to Prior Decisions of This Court.

Florida statute § 104.38 requires a newspaper which in its columns "assails" the character or attacks the official record of any candidate for public office to make available to the candidate free equal space for reply.[1] The Florida statute upheld below by the

[1] Fla. Stat. § 104.38 provides: If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree . . .

Supreme Court of Florida entitles a candidate for any public office to equal space to reply to any criticism in a newspaper, regardless of its truth or fairness and regardless of the context in which it appears. The Florida Supreme Court in upholding the constitutionality of Florida statute section 104.38 has ruled that the First Amendment permits a state to dictate to the press what it must print in its news, editorial and other columns. The entire constitutional jurisprudence of this Court contains no precedent for such a direct governmental intrusion upon the editorial freedom of a newspaper.

In holding that the Florida statute promotes the First Amendment's interest in ensuring that the public be fully informed, the Florida court ignored the well-established principle that the First Amendment prohibits government from being the arbiter of what the public shall read. As this Court has repeatedly emphasized, the predominant purpose of the First Amendment is "to preserve an untrammeled press" as "one of the great interpreters between the government and the people." *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936); *Mills* v. *Alabama*, 384 U.S. 214 (1966); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, ——— U.S. ———, 37 L.Ed.2d. 669 (1973).

The decision below is directly contrary to *New York Times Co.* v. *Sullivan, supra,* which recognized our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S., at 270.

Apart from direct governmental censorship of the sort attempted in *Near* v. *Minnesota,* 283 U.S. 697 (1931), and *New York Times Co.* v. *United States,* 403 U.S. 713 (1971), nothing could be better calculated than § 104.38 to make discussion of candidates in the press "cabin'd, cribb'd, confined, bound in to saucy doubts and fears." W. Shakespeare, *Macbeth,* Act III, Scene 4, ll. 23-24. Libel judgments and discriminatory taxes involve only money. Section 104.38 requires the editors of a newspaper to surrender something much more precious—their editorial judgment as to what should be printed in their publication; it even prescribes the type to be set and the section of the newspaper in which these governmentally mandated articles must appear. For every vehement, caustic or unpleasantly sharp attack on a candidate for public office, including a public official seeking re-election, a newspaper will pay a price—in money (for it must provide space *without compensation*) and, more importantly, in the editorial integrity of its publication. Under the statute upheld below, this price must be paid even if the attack is true, fair, objective, moderate, balanced and wholly factual. The impact of section 104.38 on freedom of the press can be seen by considering the effect the statute would have had if during the reporting on the Watergate scandals Mr. Nixon had been entitled to equal (and equally prominent) space on the front page and editorial page of *The Washington Post.* Any newspaper worthy of the First Amendment trust vested in it by the Founding Fathers will think twice before opening its pages to an invasion of self-serving press releases.

In sum, the effect of the Florida statute is to disturb the delicate balance between an independent press and

the co-equal branches of government, which has always been preserved by this Court. It is crucial to maintain this balance so that the press can continue to perform its two vital functions as critical evaluator of official conduct and independent arbiter of the newsworthiness of daily events. By intruding upon the exercise of these functions by the press, section 104.38 will turn every candidate for public office into his own reporter and editor with mass circulation and distribution guaranteed.

The court below also erred by applying to the print media the standards which this Court enunciated in *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969) with respect to the governmentally regulated and technologically limited electronic media. The Florida Supreme Court completely disregarded the repeated statements by this Court that the unique characteristics which distinguish the broadcast media from the print media "justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co.* v. *FCC, supra,* at 386. As Mr. Chief Justice Burger stated only last Term in *Columbia Broadcasting System* v. *Democratic Nat'l Comm.,* 412 U.S. 94, 117-18 (1973):

> "The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: First, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers. . . . A[broadcast] licensee must balance what it might prefer to do as a private entrepreneur with what it is required to do as a 'public trustee.'"

B. The Decision Below Conflicts with the Rulings of Other Courts.

Mississippi, the only other state that today has a right of reply statute,[2] has narrowly construed the statute's application. Although the Mississippi statute in terms affords a right of reply to any newspaper story reflecting on "honesty, integrity, or moral character," the Mississippi Supreme Court has ruled that that State's right of reply statute applies only to statements proven to be libelous. *Manasco* v. *Walley*, 63 So. 2d 91 (Miss. 1953). No such limitation applies to the statute upheld by the decision below. Libel was neither alleged in the complaint nor considered by the Florida Supreme Court. Once a newspaper has published an article reflecting adversely on a candidate, the Florida Supreme Court has held that the Florida statute gives the candidate equal space for a reply.

The decision below cannot be reconciled with the line of cases holding that the First Amendment prohibits courts and legislatures from requiring newspapers and other print media to publish particular articles, *Avins* v. *Rutgers*, 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968), or paid political or other advertising, *Chicago Joint Board ACWA* v. *Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970); *Associates & Aldrich Co.* v. *Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971).

In a recent advisory opinion to the state legislature, the Supreme Judicial Court of Massachusetts found unconstitutional a proposed statute requiring that a newspaper publish paid answers to political advertisements. The Massachusetts court concluded that requir-

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[2] Miss. Code Ann. § 23.3.25.

ing a newspaper to print is equivalent to censorship, and that the statute would have a chilling effect on the press, discouraging it from publishing any political advertising. *Opinion of the Justices,* 298 N.E.2d 829 (Mass. 1973). The same logic applies *a fortiori* to the Florida statute, which regulates a newspaper's editorial and news coverage.

II. FLORIDA STATUTE § 104.38 IS AN UNCONSTITUTIONAL ABRIDGMENT OF THE FREEDOM OF THE PRESS.

A. The First Amendment Protects the Freedom of the Press To Print Political Information and Comment Without Governmental Interference or Penalty.

The freedom of the press guaranteed by the First Amendment "was designed to serve as a powerful antidote to any abuses of power by governmental officials" and as a "means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills* v. *Alabama, supra,* at 219; *Near* v. *Minnesota, supra.* The basic premise was laid down by James Madison:

> "[T]he press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands. . . . Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press." *Report on the Virginia Resolutions,* 4 Madison's Works 544.

Political comments lose the protection of the First Amendment only when they are false and are made either with knowledge that they are false or with reckless disregard of whether they are true or false. *New*

York Times Co. v. *Sullivan, supra; Garrison* v. *Louisiana,* 379 U.S. 64 (1964); *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29 (1971). The Florida statute, however, imposes sanctions on a newspaper for publishing protected speech. The statute commandeers free space in a newspaper for a candidate's reply to any statement, whether true or not. For this reason, the Florida statute is quite different from libel retraction statutes, which give newspapers the option of limiting damages by printing a retraction after it has been shown that a defamatory falsehood was published with actual malice.[3] Note, *Vindication of the Reputation of a Public Official,* 80 Harv. L. Rev. 1730, 1740 (1967).

State interference with the freedom of the press cannot be justified as promoting the public's right to know. The First Amendment does not rest on the theory that each newspaper must present a balanced view of every issue, but rather on the principle that dissemination of information should come from diverse and antagonistic sources. *Associated Press* v. *United States,* 326 U.S. 1 (1945). Nor does a state's interest in affording the electorate an opportunity to consider both sides of an issue permit statutes which "muzzle" the press. *Mills* v. *Alabama, supra.*

A newspaper's constitutionally protected function is not to provide a public forum for the airing of all views. Each newspaper is one component in the *system* of freedom of expression, which embraces *many* important outlets for information and opinion. The philosophy of the Founding Fathers was that the public could best be informed by establishing a system of free

[3] For this reason the reliance of the court below on a footnote in the plurality opinion in *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29, 47 n.15 (1971), is entirely misplaced.

expression, not by allowing government to tell individual newspapers what to print.

Just last Term, this Court reaffirmed its adherence to the principle that government may not interfere with the journalistic integrity of a newspaper in determining the coverage to be given to issues of public importance:

> "Nor, *a fortiori,* does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors . . . [W]e reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial." *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations, supra,* at———, 680.

B. A Statute Which Imposes a Duty To Publish Abridges the Freedom of the Press.

The fact that the Florida statute takes the form of an obligation to print rather than a prohibition against printing does not lessen its unconstitutionality. The government interference which is proscribed by the First Amendment includes all regulations which create a fear of criminal or economic reprisals or otherwise unduly burden the exercise of First Amendment rights. *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967); *Talley* v. *California,* 362 U.S. 60 (1960); *Thomas* v. *Collins,* 323 U.S. 516 (1945).

The Florida statute will have a chilling effect on the protected freedom of expression of the press. This Court has consistently invalidated regulatory statutes which, although not directly prohibiting the printing or disseminating of facts and ideas, placed an impermissible burden on the exercise of First Amendment

rights. *E.g., Talley* v. *California, supra; Lamont* v. *Postmaster General,* 381 U.S. 301 (1965); *Grosjean* v. *American Press Co., supra.*

The editorial and financial burdens placed on the press by section 104.38 have the same inhibiting effect. The statute creates a strong incentive for newspapers to avoid publishing controversial columns, including the presentation of both sides of an issue, or to censor articles for statements which might be interpreted as attacking a political candidate for fear of having to devote (without compensation) equal and equally prominent space to a candidate's reply, over which the newspaper will have no editorial control.

The financial burden placed on the newspaper is also conducive to self-censorship. The statute is in effect an unconstitutional tax, measured according to the type and amount of space which a newspaper allocates to comment adverse to a candidate. *Cf. Grosjean* v. *American Press Co., supra.*

The impact of section 104.38 on marginal or ideologically oriented newspapers may be disastrous. Many of these newspapers cannot afford to print free extra copy. Nor can they afford to eliminate the critical viewpoints which are the basis of their appeal to a select audience. Journals with a recognized political viewpoint, like the *National Review* or the *New Republic,* may lose their readers if they are forced to fill their pages with self-serving responses from criticized candidates. The net effect of the Florida statute may well be to decrease the variety of news sources on which the vigorous public debate contemplated in *New York Times Co.* v. *Sullivan, supra,* depends.

C. Florida Statute § 104.38 Is Unconstitutional as a Prior Restraint on the Press.

The preceding section considered the chilling effect which a prospective right of reply under the Florida statue will have when a newspaper is deciding whether to publish a criticism of a candidate for public office. Quite apart from this chilling effect, once a criticism has already been published the administration of the statutory right of reply necessarily involves a prior restraint. The statutory right of reply pre-empts a newspaper from printing news material of its choice in space equal in quantity and prominence to the space occupied by the previously published criticism. If the space is the lead column on the front page, the newspaper is barred from printing news material of its own choice in the lead column on the front page. If the space is the lead editorial, the newspaper is barred from expressing its own editorial views in the lead editorial space. A restraint of this character is a prior restraint, condemned by *Near* v. *Minnesota, supra; New York Times Co.* v. *United States, supra.*

D. The Standards Which Govern Access to Electronic Media Are Not Applicable to the Print Media.

Section 104.38 bears a resemblance to aspects of the "fairness doctrine" which this Court has upheld as constitutionally permissible regulation of the broadcasting industry. But as both legislative history and the decisions of this Court demonstrate, this doctrine stems from the fact that broadcasting frequencies are a scarce resource whose use must be regulated by the government to prevent chaos. *Red Lion Broadcasting Co.* v. *FCC, supra.* Such considerations have no relevance to newspapers. *Cf. Brandywine-Maine Line Radio, Inc.* v. *FCC,* 473, F2d 16, 54 (D.C. Cir. 1972) (Bazelon, J., dissenting).

Red Lion also reflected this Court's recognition that during the last half century, Congress and the authorized regulatory agency, the Federal Communications Commission, had gained experience and expertise in dealing with the broadcasting industry. The challenged doctrines were the product of this administrative expertise, which was given great weight by the Court. See *Columbia Broadcasting System, Inc.* v. *Democratic Nat'l Comm., supra.*

The Florida statute is even broader in its sweep than congressional legislation[4] regulating the broadcast industry and rules of the FCC under the fairness doctrine. Congress specifically exempted from equal time provisions statements made during newscasts, news interviews, and coverage of bona fide news events. The FCC administratively adopted this exemption for the fairness doctrine. The Florida statute contains no such limitations. The FCC political editorial rule applies only to editorial endorsements of candidates and does not require, as the Florida statute does, that the candidate adversely affected be given equal and equally desirable time to reply.

III. THE VAGUENESS OF FLORIDA STATUTE § 104.38 VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Due Process Clause requires that criminal statutes whose prohibitions are not clearly defined be struck down as void for vagueness. *Grayned* v. *City of Rockford,* 408 U.S. 104 (1972); *Papachristou* v. *City of Jacksonville,* 405 U.S. 156 (1972); *Cramp* v.

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[4] Section 315(a) of the Communications Act of 1934, 47 U.S.C. § 315(a) requires licensees who permit one candidate to use their stations to afford equal opportunities to other candidates for the same office.

Board of Public Instruction, 368 U.S. 278 (1961). Where First Amendment rights are at stake, vague laws are particularly suspect, since their effect may be to chill activities beyond the unlawful zone. *Baggett* v. *Bullitt,* 377 U.S. 360 (1964); *Ashton* v. *Kentucky,* 384 U.S. 195 (1966).

The Florida statute is a criminal statute, although it was applied below in a civil proceeding. The terms of the statute are unconstitutionally vague in at least two significant ways:

—The statute covers "newspapers", but provides no guidance as to what this term includes beyond daily journals of general circulation. Are magazines and other periodicals covered?

—The prohibition against comments which "assail" the personal character of candidates is subject to completely subjective determinations as to the meaning of "assail".

Provisions this vague cannot satisfy the Due Process Clause. See, *e.g., Coates* v. *Cincinnati,* 402 U.S. 611 (1971).

IV. FLORIDA STATUTE § 104.38 IS AN UNCONSTITUTIONAL TAKING OF PROPERTY WITHOUT COMPENSATION IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

By requiring that a newspaper publish without compensation the reply of a candidate, Florida Statute § 104.38 takes private property unconstitutionally. *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922). The newspaper's columns are its own private property. If, for public purposes, a state takes this space, which has substantial economic value, it must compensate the newspaper accordingly. This is particularly true

as newspapers find economic survival increasingly difficult. Section 104.38 authorizes takings without compensation, in violation of the Due Process Clause.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction in this case.

Respectfully submitted,

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FILED
DEC 7 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY, a Division of Knight Newspapers, Inc., *Appellant*

v.

PAT L. TORNILLO, JR., *Appellee*

On Appeal from the Supreme Court of Florida

BRIEF OF AMICUS CURIAE, THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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IN THE

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PRELIMINARY STATEMENT

The American Newspaper Publishers Association submits this brief as amicus curiae in support of Appellant's Jurisdictional Statement. The written consents of the Appellant and Appellee to the filing of this brief have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association (hereinafter referred to as "ANPA" or the "Association") is a nonprofit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,000 daily newspapers, representing over ninety percent of the total daily and Sunday newspaper circulation in the United States. The Miami Herald Publishing Company and twenty-six other newspapers located throughout the State of Florida hold membership in the ANPA.

To the knowledge of your amicus, this case represents the first litigation involving the issue of constitutionality of a state statute requiring a newspaper to publish, free of charge, a response to charges against any candidate for nomination or election. For this reason, the decision below will have major impact, not only upon newspapers in the State of Florida, but also upon newspapers throughout the United States where similar statutes may exist or be enacted. Because of this impact, your amicus desires to present to this Court for its assistance the views of the majority of its members in regard to the constitutionality and legality of the State of Florida Statutes, § 104.38.

ARGUMENT

The appellee was a candidate for a state office who demanded that the appellant print verbatim his response to two editorials which allegedly attacked the appellee's personal character.

The trial court concluded that the Florida Statutes, § 104.38 was an unconstitutional restraint upon free-

dom of speech and press. The Florida Supreme Court, in a decision contrary to the trial court, determined that the statute in question enhanced, rather than abridged, the First and Fourteenth Amendments to the Constitution of the United States.

Your amicus respectfully submits that the Florida statute in question is clearly unconstitutional and that it, permitted to stand, formulates a devastating inroad upon the freedom of the press guaranteed by the First Amendment. Not only does the statute compel a newspaper to print editorial material with which it does not agree, but also it indirectly and subtly must surely have stifling effect upon a newspaper's editorial freedom when it can be anticipated that a reply of unknown comment to the editorial must be published, free of cost, with equal dignity accorded the original editorial.

The Supreme Court of Florida for the most part erroneously based its opinion upon a case dealing with the electronic media, *Red Lion Broadcasting Co., Inc.* v. *FCC,* 395 U.S. 367 (1969), in which this Court upheld the constitutionality of the FCC "fairness doctrine" and found that it did not violate the First Amendment guarantees of freedom of speech and press. It is clear, however, from a reading of *Red Lion* that this Court did not intend its words to be applied to the private press of this country. The issues and holding in that case relate only to the regulation of the broadcast medium, which is a medium not open to all and one which by the very genesis of its electronic being is subject to governmental control. The problem in *Red Lion* as seen by this Court was a possibility of station owners and a few networks having within their power as private interests the ability to censor the free exchange of information in the broadcast medium.

Certainly, no extensive argument is required to convince this Court that *Red Lion* does not constitute precedent for permitting the State of Florida to dictate to a free press when, where and what it will publish in its daily newspapers.

Further, the Court below relied upon this Court's decision in *Associated Press* v. *U.S.*, 326 U.S. 1 (1945), in reaching its decision. Again, its reliance is clearly misplaced. *Associated Press* concerned monopolistic practices and only stands for the proposition that the business of operating a newspaper, like other businesses, is subject to usual business regulation, including regulation under applicable antitrust laws. It appears that the Court below in relying so heavily upon *Red Lion* and *Associated Press* believed that those cases supported its theory that, since daily newspapers and chain newspapers have become so large, they tend to in some way improperly or illegally monopolize the dissemination of news. To the contrary, however, it is submitted that what this Court in essence said in *Red Lion* and *Associated Press* is that the First Amendment right to a free press not only prohibits governmental interference but also prohibits interference with the exercise of a free press by private interest. In other words, private interests cannot conspire to interfere with another's right of freedom of press.

In this case no one is conspiring, or in any way attempting, to intrude upon or to repress Appellee's exercise of his constitutional guarantee of a free press or his constitutional guarantee to express in any manner his views on political issues. The "right" Appellee is, in fact, asserting is a "right" given to him by the State of Florida under Section 104.38 of its statutes.

Although the Court below indicates that it recognizes that *Red Lion* is perhaps in some way distinguishable as a case dealing with the broadcast medium, the Court below believed that the law as enunciated by this Court concerning regulation of the broadcast medium was clearly applicable to, and controlling on, the print medium. For instance, in its opinion the Court below stated that *Red Lion* was applicable to the facts of the case before it since it could take judicial notice of the fact that publishers of newspapers rely upon the gathering and dissemination of news transmitted over telegraph wires or air waves to and from news-gathering bodies and newspapers. Without further comment on the logic of this reasoning, suffice it to say that your amicus does not contest for a moment that telegraph wires and air waves are subject to regulation and may be regulated. However, this is a function separate and apart from Appellee's exercise of its guarantee of freedom to utilize the medium of the printed word.

It would appear that the Court below has in some way decided that since competition is rapidly vanishing in the business of the publication of daily newspapers and that the trend is toward the concentration of ownership of mass media, including newspapers, the Florida statute in question here is justified because it permits the individual candidate for office, who does not own or have unlimited access to a daily metropolitan newspaper, a right to express his views on equal terms with that of the large newspaper owner. In other words, the Court below has indicated that the First Amendment guarantee to a free press must somehow be adjusted to eliminate the inequitable disparity in the ability of a large news-

paper to publish or exercise its freedom of press and ability of an individual candidate for office to exercise his freedom of the press. This is precisely that type of frightening logic often espoused to the effect that an individual's Fourth Amendment right to be free from an unreasonable search and seizure should be abrogated by the courts when the effect of upholding that right allows a guilty man to go free. In other words, even if the free and fair exercise of constitutional guarantees may result in inequities or injustices, the overall benefit to society must suffer in the long run if this Court does not enforce those guarantees on a uniform and impartial basis.

The Supreme Court of Florida in this case has adopted the untenable position that the press is only one-half free unless others have access to that press to express an opposing view on matters of political and public concern. Similar arguments were rejected in the *Chicago Joint Board, Amal. Cloth. Workers* v. *Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971), wherein a newspaper refused to publish advertisements submitted to it by a union purporting to present the union's view in a labor dispute. The Court of Appeals, in rejecting the union's contentions, stated:

> "The Union's right to free speech does not give it the right to make use of the defendants' printing presses and distribution systems without defendants' consent." 435 F.2d 478.

Similarly, this issue was faced in the case of *Associates & Aldrich Co.* v. *Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971), wherein the Court stated at p. 135:

> "Appellant has not convinced us that the Courts or any other governmental agency should dictate the contents of a newspaper."

The issue presented in this case is fundamental. The struggle for liberty has historically been a struggle against government. The Founding Fathers in their collective wisdom sought to prevent the curtailment of freedom of religion, press, assembly and speech. "Madison and the other Framers of the First Amendment, able men they were, wrote in language they earnestly believed could never be misunderstood: 'Congress shall make no law . . . abridging the freedom . . . of the press . . .' Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints." *New York Times* v. *United States,* 403 U.S. 713, 716-17 (1971).

As recent as July 13, 1973, the Supreme Judicial Court of Massachusetts issued an opinion concerning proposed legislation in that state which would require a newspaper accepting a paid political advertisement for one group to accept for publication a paid political advertisement advocating a contrary view. The Court in its opinion considered not only the rationale of the so-called "fairness doctrine" upheld in *Red Lion, supra,* but also the proposition that the intent of the statute was to foster the expression of all views in the public interest. The Massachusetts Court concluded that the statute was unconstitutional and that, paradoxically, a result opposite from the one desired would be achieved. Further, the Court held that combating alleged media concentration would in no way justify the abridgment of First Amendment rights.

If the legislature can dictate to the press what it must print in the public interest regarding candidates

for election, it follows that freedom of expression shall not long be a right retained by the people but a limited privilege exercised under the color of public interest by whomever acts with the authority of government.

Justice Stewart, in a concurring opinion in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, — U.S. —, 36 L.Ed. 2d 772, 807-08 (1973), stated:

> "There is never a paucity of arguments in favor of limiting the freedom of the press. The Court of Appeals concluded that greater government control of press freedom is acceptable here because of the scarcity of frequencies for broadcasting. But there are many more broadcasting stations than there are daily newspapers. And it would require no great ingenuity to argue that newspapers too are Government. After all, newspapers get Government mail subsidies and a limited antitrust immunity. The reasoning of the Court of Appeals would then lead to the conclusion that the First Amendment requires that newspapers too be compelled to open their pages to all comers.
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> • • • •
>
> "Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that 'fairness' was far too fragile to be left for a government bureaucracy to accomplish. History has many times confirmed the wisdom of their choice."

The amicus is ever mindful of the potential influence of the press and dedicated to the proposition that a free and open society requires the widest dissemination of all ideas and positions from as many different sources as possible if our society is to remain free. Interent in a truly free press is the unfettered right to criticize or to advocate. For every publisher who

may express a critical view, there are others who will express an opposing view.

It is respectfully submitted that the application of the Florida statute to the Appellant herein presents to this Court the most substantial and clear-cut violation of the constitutional guarantee of a free press that this Court has ever been called upon to review. If the decision of the Florida Court is sustained, freedom of the press as explicitly guaranteed by the Constitution shall soon perish and be replaced by administrative fiat.

CONCLUSION

It is respectfully urged that this Court enter an order noting probable jurisdiction in order that the substantial constitutional questions raised by this appeal relative to freedom of speech and of the press can be fully examined.

Respectfully submitted,

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DEC 10 1973

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—v.—

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, *AMICI CURIAE*, IN SUPPORT OF JURISDICTIONAL STATEMENT

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Interest of *Amici*[1]

The American Civil Liberties Union is a fifty-three year old non-partisan organization engaged solely in defense of the rights protected by the Bill of Rights. First among those rights are the freedoms of speech and the press. The Florida statute involved in this case (Sec. 104.38, Florida Statutes), and the decision of the Supreme Court of Florida holding that statute constitutional, is an immediate threat to the freedom of the press. We believe that Sec. 104.38 is so clearly offensive to the First Amendment that summary reversal is justified. If the Court

[1] This brief is filed with the consent of both parties. The letters of consent are filed with the Clerk of the Court.

disagrees with our suggestion of summary reversal, then jurisdiction should surely be noted.

Statute Involved

Sec. 104.38, Florida Statutes:

> Newspaper assailing candidate in an election; space for reply.—If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083.

Statement of the Case

Tornillo, leader of the Dade County Classroom Teachers' Association, was a candidate for the nomination of the Democratic Party in the Florida House of Representatives in the Fall of 1972. The Miami Herald published an editorial in September 1972 opposing Tornillo's election, calling him a "czar" and a lawbreaker who engaged in an "illegal act against the public interest." The editorial stated that it would "be inexcusable of the voters if they sent Pat Tornillo to Tallahassee" (J.S. A45).[2] The paper ran a second editorial the following week, five days before the election, which said (J.S. A47):

> "For years now [Tornillo] has been kicking the public shin to call attention to his shakedown statesmanship . . . Give him public office, says Pat, and he will no doubt live by the Golden Rule. Our translation reads that as more gold and more rule."

On September 30, 1972, Tornillo requested *The Miami Herald* to print verbatim and free of cost a statement submitted by him, pursuant to Section 104.38, Florida Statutes. *The Miami Herald* did not print the material submitted by Tornillo. Tornillo did not request a retraction pursuant to Sec. 770.02, Florida Statutes, or otherwise claim that the editorials were libelous, untrue, or inaccurate.

On October 1, 1972, Tornillo filed a civil action in the Circuit Court for the Eleventh Judicial Circuit seeking

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[2] The symbol J.S. refers to the Jurisdictional Statement filed by appellant in this Court.

to require *The Miami Herald* to publish his "reply," and to obtain damages. Circuit Judge Francis J. Christie held an emergency hearing on the matter on October 2, 1972. The Attorney General was notified of the suit pursuant to Sec. 86.091, Florida Statutes, requiring notice of any action in which a statute is alleged to be unconstitutional, and he was represented at the hearing.

At the hearing, the Court was advised that the Attorney General had refused to appeal a decision by Volusia County Judge J. Robert Durden which had held Sec. 104.38 unconstitutional, because the Attorney General himself had reservations about the constitutionality of the statute. That case, *State* v. *News-Journal,* 36 Fla. Supp. 164 (Volusia County, Fla., Judges Ct. 1972) was apparently the first case brought under Sec. 104.38 since its enactment in 1913. The Attorney General advised Judge Christie that his opinion was unchanged since the *News-Journal* case, and that he continued to have doubts as to the constitutionality of Sec. 104.38, and therefore would not defend the statute.

At the conclusion of the hearing, Judge Christie ordered Tornillo's case dismissed with prejudice, holding the statute void on its face as an impermissible restriction upon freedom of speech and press in violation of the First and Fourteenth Amendments to the Constitution of the United States and, in addition, denied due process of law under the Fourteenth Amendment because of its vagueness and ambiguity. On appeal, the Florida Supreme Court reversed, holding Sec. 104.38 constitutional, one Justice dissenting.

ARGUMENT

The decision of the Florida Supreme Court is so plainly wrong, it should be summarily reversed.

This Court has been historically consistent in resisting attempts by the federal and state governments to invade or diminish the right of newspapers freely to choose the material they will put into print. Whether the attempts have taken the form of prior restraints,[3] subsequent punishments,[4] discriminatory taxes,[5] or inhibiting forms of libel actions,[6] the Court has uniformly recognized that the purpose of the First Amendment is to insure and encourage a free press as a fundamental instrument of political liberty. Even so conservative a jurist as Mr. Justice Sutherland appreciated the indispensability of a free press in a free society. Speaking for the Court in *Grosjean* v. *American Press Co., supra* at 250, he described the function of a free press in the following terms:

> ". . . since informed public opinion is the most important of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern . . . . A free press stands as one of the

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[3] *Near* v. *Minnesota*, 283 U.S. 697 (1931); *New York Times* v. *United States*, 403 U.S. 713 (1971).

[4] *Bridges* v. *California*, 314 U.S. 252 (1941); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Craig* v. *Harney*, 331 U.S. 367 (1947); *Mills* v. *Alabama*, 384 U.S. 214 (1966).

[5] *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936).

[6] *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Butts* v. *Curtis Publishing Co.*, 388 U.S. 130 (1967); *Rosenbloom* v. *Metromedia*, 403 U.S. 29 (1971).

> great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

The same appreciation permeates the Court's opinion thirty years later in *Mills* v. *Alabama*, 384 U.S. 214 (1966). Mr. Justice Black's opinion for the Court said (at 219):

> "Suppression of the right of the press to praise or criticise governmental agents and to clamor and contend for or against change . . . muzzles . . . the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free."

The fact is that the freedom of the press in the United States has been, and is constitutionally required to be, virtually absolute, as least so far as news and comment upon public affairs are concerned, and certainly where election of public officials is concerned.[7] Apart from one case authorizing a prior restraint upon publication of a critical analysis of the Central Intelligence Agency by a former employee,[8] and (arguably) this Court's decision last term in *Pittsburgh Press* v. *Pittsburgh Commission on Human*

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[7] As this Court said in *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964):

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."

[8] *Marchetti* v. *United States*, 466 F.2d 1309 (4th Cir. 1972), cert. denied 409 U.S. 1063 (1972). A suit to review the constitutionality of deletions ordered by the Central Intelligence Agency from the completed book is now pending. *Knopf, Marchetti and Marks* v. *Colby and Kissinger*, No. 540-73-A, E.D. Virginia. Cf. *New York Times* v. *United States*, 403 U.S. 713 (1971).

Relations, 37 L. Ed. 2d 669 (1973), no case since *Milwaukee Publishing Co.* v. *Burleson*, 255 U.S. 407 (1921), is to be found which upholds the power of the federal or state governments to forbid the exercise of free editorial choice or which punishes the press for exercising that choice.[9] That historical fact is a precious feature of our political system, and should it be diluted it would change the face of our society.

The decision of the Florida Supreme Court in this case violates the "clear command that Government must never be allowed to lay its heavy editorial hand on any newspaper in this country." *Pittsburgh Press* v. *Pittsburgh Commission on Human Relations, supra* at 687 (Stewart, J., dissenting). It is such a radical departure from common understanding of the meaning and utility of the First Amendment, it warrants swift and summary reversal.

The opinion of the Florida Supreme Court would have this Court believe and adopt its assertions that ". . . this statute [F.S. Sec. 104.38] enhances rather than abridges freedom of speech" (J.S. A3); and that "The First Amendment did not create a privileged class which through a monopoly of instruments of the newspaper industry would be able to deny to the people the freedom of expression

[9] *Dickinson* v. *United States*, 476 F.2d 373 (5th Cir. 1973), cert. denied 42 U.S.L.W. 3237 (October 23, 1973), if viewed charitably, could be said not to be another exception to this general principle. Literally, *Dickinson* could be said neither to forbid nor to punish, but only to postpone publication pending appeal of the contempt. Realistically, *Dickinson* must be said to punish publication of constitutionally protected information relating to a public trial, since the district court order at issue in that case had all the judicial legitimacy of a "letter to a newspaper." *United States* v. *United Mine Workers*, 330 U.S. 258, 309-310 (1947) (Frankfurter, J., concurring).

which the First Amendment guarantees" (J.S. A9). But those statements are at best clichés which ignore five hundred years of history[10] and rest upon no reasoned inquiry whatever into the history or function of the First Amendment.[11]

There has been a theory advanced in recent years which would attempt to justify the imposition upon newspapers

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[10] See Siebert, Freedom of the Press in England, 1476-1776 (Univ. of Ill. Press 1952), pp. 117-20, 380-92; *New York Times* v. *Sullivan, supra* at 269-278.

[11] The superficial quality of the Florida Supreme Court's opinion is captured by the following excerpt from its opinion (J.S. A11):

> "Although we have carefully considered appellee's argument that Red Lion Broadcasting Co. v. Federal Communications Commission [395 U.S. 367 (1969)], supra, is inapplicable to the present cause, we cannot discount certain excerpts therefrom which are applicable to First Amendment guarantees in general. Therein, the Supreme Court explained that,
>
> 'Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communcation.' 395 U.S. at 401, n. 28."

That quotation from this Court's opinion in *Red Lion* is actually a shocking distortion of note 28. That footnote is a mere aside by the Court which acknowledges but expressly declines to deal with two additional arguments put forward in defense of the fairness doctrine. Thus, the quotation, as stated by the Florida Supreme Court, begins in the middle of the third sentence of note 28 and simply neglects to include its opening words:

> *"A related argument, which we also put aside, is that quite apart from scarcity of frequencies, technological or economic,* Congress does not abridge freedom of speech . . . etc., etc." (emphasis added).

The source of the distorted version of note 28 is found at pp. 34-35 of the Brief for Appellant in the Florida Supreme Court. Presumably the Florida Supreme Court innocently accepted that version of the quote.

of the duty reflected by the statute at issue in this case. See Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967); Barron, Access—The Only Choice For the Media?, 48 Tex. L. Rev. 766 (1970); Barron, Freedom of the Press For Whom? The Right of Access to Mass Media (Indiana U. Press 1973). The theory has been put forward unsuccessfully in other cases, in less radical form. Those cases claimed not that one had a right to seize editorial or news space as in this case, but the narrower claim that one had the right to require privately owned newspapers to sell advertising space to those who wished to publish so-called editorial advertisements. But even that claim has been uniformly rejected. *Chicago Joint Board* v. *Chicago Tribune Co.*, 435 F.2d 471 (7th Cir. 1970); *Opinion of the Justices* (Sup. Jud. Ct. of Mass.), 42 U.S. Law Week 2074 (Aug. 13, 1973).

Indeed, a majority of this Court has already let it be known that the statute in this case is constitutionally impermissible. In *Columbia Broadcasting Co.* v. *Democratic National Committee,* 36 L. Ed.2d 772 (1973), the question was whether broadcasters were required to sell time to groups which wished to broadcast short editorial advertisements. The Court held they were not, though the question was thought difficult and debatable. Debatable as *that* question may have been to the Court, six Justices, including the two dissenters, agreed that there was no constitutionally tenable argument to support a claim of access to the print media. 36 L. Ed.2d at 792 (Burger, CJ., and Rehnquist, J.), 808 (Stewart, J.), 811-812 (Douglas, J.), 829, n. 12 (Brennan and Marshall, JJ.). As Mr. Justice Brennan, one of the dissenters put it:

> ". . . the factors that compel the conclusion that the Government is involved in the promulgation and enforcement of the challenged broadcaster policy have simply no relevance to newspapers. The decision as to who shall operate newspapers is made in the free market, not by Government fiat. The newspaper industry is not extensively regulated and, indeed, in light of the differences between the electronic and printed media, such regulation would violate the First Amendment with respect to newspapers." *Supra* at 829, n. 12.

Since intrusion into news or editorial columns is more oppressive than compulsory sale of advertising space, it necessarily follows that the opinion of the Florida Supreme Court in this case is wholly without merit and that Sec. 104.38 unarguably violates the First Amendment.

CONCLUSION

Jurisdiction should be noted and the decision below should be summarily reversed.

Respectfully submitted,

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December, 1973.

DEC 19 1973

MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a Division of Knight Newspapers, Inc.,

Appellant,

v.

PAT L. TORNILLO, JR.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS LEGAL DEFENSE AND RESEARCH FUND, ART BUCHWALD, HORANCE G. DAVIS, JR., JAMES J. KILPATRICK, ANTHONY LEWIS, ROBERT D. NOVAK, CARL T. ROWAN, HUGH SIDEY, THOMAS G. WICKER, AND JULES J. WITCOVER AS *AMICI CURIAE*

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The Reporters Committee for Freedom of the Press Legal Defense and Research Fund and nine individual news reporters, editorial writers, and commentators submit this brief as *amici curiae* in support of appellant's appeal from the judgment of the Supreme Court of Florida, entered on October 10, 1973, which held that Section 104.38 of the Florida Statutes does not violate the First Amendment to the United States Constitution, which is made applicable to the States through the Due Process Clause of the Fourteenth Amendment. Counsel for all parties have given written consent to the filing of this brief pursuant to Supreme Court Rule 42(1).

Statute Involved

Florida Stat. § 104.38 provides:

> "If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 [by imprisonment not exceeding one year] or § 775.083 [by a fine not exceeding $1,000]."

Questions Presented

1. Does the First Amendment to the United States Constitution, which is made applicable to the States through the Due Process Clause of the Fourteenth Amendment, permit a State to require a newspaper to publish editorial material which the newspaper does not wish to publish, allegedly in order to promote a fuller and more balanced flow of information and ideas to the public?

2. Does the First Amendment permit a State to restrict the right of newsmen to report and comment on controversial news by imposing criminal liability upon newspapers for publishing articles that "assail" or "attack" a

political candidate without publishing replies by the candidate?

3. Is Florida Stat. § 104.38 unconstitutionally vague?

Interest of *Amici Curiae*

The Reporters Committee for Freedom of the Press Legal Defense and Research Fund is a voluntary association formed in March 1970 to protect the First Amendment and freedom of information rights of working press personnel of all media. The members of The Reporters Committee include news editors, commentators, and reporters employed by newspapers, magazines, and radio and television networks, as well as free lance journalists.*

Eight of the individual *amici* are news reporters and commentators who frequently write about political candidates. Their articles are published in Florida and would frequently be subject to demands for space to reply under Florida Stat. § 104.38. They are: Art Buchwald and Jules J. Witcover (distributed in Florida by the Washington Post/Los Angeles Times News Service), James J. Kilpatrick (distributed in Florida by the Washington Star Syndicate), Anthony Lewis and Thomas G. Wicker (distributed in Florida by The New York Times News Service), Robert D. Novak and Carl T. Rowan (distributed in Florida by Publishers Hall Syndicate), and Hugh Sidey (distributed in Florida by Time Magazine). The ninth in-

* The Reporters Committee publishes a quarterly *Press Censorship Newsletter* which is distributed free of charge, and maintains an information center on the First Amendment rights of members of the press. The Reporters Committee also assists in providing legal advice, representation, and research in significant cases involving the First Amendment rights of the working press.

dividual *amicus*, Horance G. Davis, Jr., writes editorial articles for the Gainesville (Florida) *Sun*, which are distributed in Florida by The New York Times Media Corporation. The views expressed by the individual *amici* herein are their individual views, and are not necessarily those of the news organizations with which they are associated.

The decision of the Supreme Court of Florida in the present case is of deep concern to members of the working press. The Florida Supreme Court's decision, for the first time in the history of the United States, holds that the First Amendment permits a State to require a newspaper to publish editorial material which the newspaper does not wish to publish. The Reporters Committee believes that, if the Florida Supreme Court's decision is not reversed by this Court, statutes like Florida Stat. § 104.38 may rapidly be enacted in many other States. At present only two States have such statutes, and none of them appears to have been judicially enforced until the Florida Supreme Court's decision in the present case (*see* p. 5 *infra*).

Statutes such as Florida Stat. § 104.38, if sustained by this Court, would have a serious adverse impact on news reporting, news commentary, and editorials in American newspapers. The amount of news reporting and news commentary on elections and governmental affairs would be substantially reduced and much of its frankness and clarity sacrificed in order to avoid criminal penalties for failing to meet free space demands.

ARGUMENT

I.

Under the First Amendment, a Newspaper May Not Be Compelled to Publish Editorial Material Which It Does Not Wish to Publish.

The present appeal brings before this Court, apparently for the first time in its history, a state statute which has been held to require a newspaper to publish editorial material which it does not wish to publish.* The Florida Supreme Court held that Florida Stat. § 104.38 does not curtail the freedom of the press because it does not prohibit a newspaper from publishing anything it wishes, but rather requires the newspaper to publish replies to its "attacks" on candidates, and thereby allegedly promotes a more balanced flow of information and ideas to the public (J.S. App. 8, 13).

This holding is radically inconsistent with the freedom of the press guaranteed by the First Amendment, which is made applicable to the States by the Due Process Clause

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*Only two States, Florida and Mississippi, have right-of-reply statutes (Florida Stat. § 104.38; Miss. Code Ann. § 3175). The present case is the first reported American decision in which such a statute has been held applicable and constitutional. Although right-of-reply statutes exist in European and Latin American civil law countries, they apparently have no antecedents in common law countries. *See generally* Donnelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 Va. L. Rev. 868, 884-92 (1948). It is an almost uniform rule of common law that a newspaper cannot be compelled to publish anything against its will. *See, e.g.*, Annot., 18 A.L.R. 3d 1286 (1968).

A number of States (including Nevada, which formerly had a right-of-reply statute) have retraction statutes, which provide that the printing of a retraction or reply will mitigate damages in a subsequent libel action. *See generally, e.g.*, Donnelly, *supra* at 892-96. Such statutes differ fundamentally from right-of-reply statutes.

of the Fourteenth Amendment. The fundamental premise of the First Amendment is that it is no part of the business of government to compel a news reporter, editor, commentator, or publisher to express what the government deems to be balanced views. Instead, the premise of the First Amendment is that sound and balanced conclusions will be attained through free and unfettered expression rather than through "any kind of authoritative selection." *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (L. Hand, *J.*), *aff'd*, 326 U.S. 1 (1945), *quoted in New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

It is clear beyond question that under the First Amendment a State may not seek to guarantee a balanced flow of news and ideas in the press by censoring the press and deleting "unbalanced" articles and editorials. *Cf., e.g., Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971); *Near* v. *Minnesota*, 283 U.S. 697, 713-23 (1931). It is equally well established that a State may not seek to further a balanced flow of views to the public by prohibiting the press from expressing its views at a time when the State deems an effective reply impossible. *Mills* v. *Alabama*, 384 U.S. 214, 219-20 (1966). By the same token, a State may not seek to attain balance in the press by forcing the press to print replies to articles and editorials which the State considers unbalanced and one-sided.

This Court has apparently not yet been faced with a state statute or decree seeking to require a newspaper to publish news or editorial material against its will. Indeed, this Court stressed in *Branzburg* v. *Hayes*, 408 U.S. 665, 681

(1972), that no such requirement was before it:

> "But these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold."

Lower courts that have considered the question have held, apparently with the sole exception of the court below, that such a requirement would violate the First Amendment. *E.g., Associates & Aldrich Co., Inc.* v. *Times Mirror Co.*, 440 F.2d 133, 135 (9th Cir. 1971); *Brown* v. *Murphy*, 355 F. Supp. 416, 417 (S.D.N.Y. 1973); *Yablonski* v. *UMW*, 305 F. Supp. 868, 872 (D.D.C. 1969); *Opinion of the Justices*, 298 N.E.2d 829, 834-35 (Mass. 1973).* We submit that this result is compelled by this Court's decisions and the basic purposes of the First Amendment guarantee of freedom of the press.

The Florida Supreme Court, in upholding Florida Stat. § 104.38, relied heavily (J.S. App. 10-11) upon *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367 (1969), in which this Court rejected a First Amendment attack upon the Federal Communications Commission's personal attack rule, which imposes upon radio and television broadcast licensees obligations resembling those which Florida Stat. § 104.38 would impose upon newspapers. But this Court

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* A wholly distinct issue is presented by the holding of some courts that there is a First Amendment or Equal Protection right to publish advertisements in *governmentally owned* newspapers or other media. *Compare, e.g., Lee* v. *Board of Regents*, 441 F.2d 1257, 1258-60 (7th Cir. 1971), *with, e.g., Lehman* v. *City of Shaker Heights*, 34 Ohio St. 2d 143, 296 N.E.2d 683 (1973), *cert. granted*, 42 U.S.L.W. 3283 (U.S. Nov. 12, 1973).

made clear in *Red Lion* that its holding rested upon the peculiar characteristics of radio and television broadcasting. At the outset of its discussion of the First Amendment issues in *Red Lion*, the Court stated that "differences in the characteristics of news media justify differences in the First Amendment standards applied to them." 395 U.S. at 386 (footnote omitted).

The first characteristic of radio and television broadcasting stressed by the Court in *Red Lion* is the fact that available broadcast frequencies are limited by technical and physical factors, and must therefore be allocated by the FCC licensing process. 395 U.S. at 387-92. The limited availability of broadcast frequencies has historically been recognized as the "unique characteristic" justifying government regulation of broadcasting:

> "Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation." *NBC* v. *United States*, 319 U.S. 190, 226 (1943).

There are no comparable physical or technical limitations on the press. *E.g.*, T. I. Emerson, The System of Freedom of Expression 667-68 (1970); Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 Harv. L. Rev. 768, 785 (1972).

The Florida Supreme Court sought to draw a parallel between newspapers and broadcasting by stating that "competition is rapidly vanishing and news corporations are acquiring monopolistic influence over huge areas of the

country" (J.S. App. 8). But possible economic barriers to entry into the newspaper field do not have the absolute quality of rigid physical limitations. Moreover, to the extent that there are barriers to entry into newspaper publishing, government always has the less restrictive alternative of subsidizing new entry into the newspaper field. T. I. Emerson, The System of Freedom of Expression 671 (1970); *cf. Opinion of the Justices*, 298 N.E.2d 829, 835 (Mass. 1973).

For these reasons, a State simply cannot regulate newspaper publishing as the FCC regulates broadcasting. This may be seen most clearly by considering whether the Constitution would permit a State to expropriate the right to publish the sole newspaper in a given city and turn it over to some other person who the State thought would use it more effectively in the public interest, or to forbid additional newspapers from commencing publication in a given city because they would jeopardize the economic survival of the existing newspapers, or to deny a continued license to publish for violation of a state-imposed fairness doctrine. The FCC has—and has exercised—all of these powers in the broadcasting field.

The second factor stressed by the Court in *Red Lion* was that any danger that the personal attack rule would lead to self-censorship and reduced coverage of controversial public issues by broadcast licensees could be met by the FCC's power to insist on adequate coverage of public issues as a condition of license renewal. 395 U.S. at 392-95. By contrast, government simply cannot require newspapers to meet standards of "balance" or "adequacy of coverage" in

order to continue to publish. As Zechariah Chafee, Jr. wrote in 1947,

> "liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper. A journal does not merely print observed facts the way a cow is photographed through a plate-glass window. As soon as the facts are set in their context, you have interpretation and you have selection, and editorial selection opens the way to editorial suppression. Then how can the state force abstention from discrimination in the news without dictating selection?" 2 Government and Mass Communications 633 (1947).
>
> "The FCC is the one department of the government which probably has the power to compel some measure of broadmindedness. Whether it ought to do so in these cases or other specific cases is an important question, but it can do so if it sees fit. This is, I believe, the sensible view to take until the Supreme Court passes on the point. The First Amendment obliges the government to keep its hands off newspapers, but the Amendment necessarily works out differently for radio simply because radio *is* different. . . ." *Id.* at 638.

The fundamental distinction between newspapers and broadcasting was very recently reaffirmed by the opinions of this Court in *CBS* v. *Democratic Nat'l Committee*, 412 U.S. 94 (1973), in which the Court held that even as to broadcast licensees the First Amendment did not require the FCC to direct the acceptance of paid editorial advertising. The opinions in *CBS* clearly implied that newspapers may not be compelled to publish anything. The opin-

ion of Mr. Chief Justice Burger contrasted permissible government regulation of newspapers and broadcast licensees:

> "The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers. A broadcast licensee has a large measure of journalistic freedom but not as large as that exercised by a newspaper. A licensee must balance what it might prefer to do as a private entrepreneur with what it is required to do as a 'public trustee.'" 412 U.S. at 117-18.

The dissenting opinion of Mr. Justice Brennan drew an equally clear line between newspapers and broadcast licensees:

> "Indeed, the factors that compel the conclusion that the Government is involved in the promulgation and enforcement of the challenged broadcaster policy have simply no relevance to newspapers. The decision as to who shall operate newspapers is made by the free market, not by Government fiat. The newspaper industry is not extensively regulated and, indeed, in light of the differences between the electronic and printed media, such regulation would violate the First Amendment with respect to newspapers." 412 U.S. at 182 n.12.

The concurring opinions of Mr. Justice Douglas and Mr. Justice Stewart in *CBS*, while they questioned the strength of the distinction between broadcast licensees and newspapers, agreed that the First Amendment does not permit the government to force newspapers to publish anything

against their will. The concurring opinion of Mr. Justice Stewart reasoned that if broadcast licensees could be compelled to accept editorial advertisements, newspapers could also be compelled to do so, a conclusion which the First Amendment would not permit:

> "The reasoning of the Court of Appeals would then lead to the conclusion that the First Amendment requires that newspapers, too, be compelled to open their pages to all comers.
>
> Perhaps I overstate the logic of the opinion of the Court of Appeals. Perhaps its 'balancing' of First Amendment 'values' would require no more than that newspapers be compelled to give 'limited' access to dissident voices, and then only if those voices were 'responsible.' And perhaps it would require that such access be compelled only when there was a single newspaper in a particular community. But it would be a close question for me which of these various alternative results would be more grossly violative of the First Amendment's guarantee of a free press. For that guarantee gives *every* newspaper the liberty to print what it chooses and reject what it chooses, free from the intrusive editorial thumb of Government." 412 U.S. at 145.

Similarly, the concurring opinion of Mr. Justice Douglas stated:

> "It would come as a surprise to the public as well as to publishers and editors of newspapers to be informed that a newly created federal bureau would hereafter provide 'guidelines' for newspapers or promulgate rules that would give a federal agency power to ride herd on the publishing business to make sure that fair comment on all current issues was made. . . .
>
> * * *

> The sturdy people who fashioned the First Amendment would be shocked at that intrusion of Government into a field which in this Nation has always been reserved for individuals, whatever part of the spectrum of opinion they represent." 412 U.S. at 150-151.

For these reasons, any attempt to impose a general governmental "fairness doctrine" on the press would violate the First Amendment. It has been suggested, however, that while a general "fairness doctrine" would be "unacceptable, indeed unconstitutional, as applied to the press", a limited right-of-reply statute like Florida Stat. § 104.38 "would not seem to entail any serious adverse effect upon the newspaper", and "could be phrased in precise terms and readily administered through the usual forms of judicial process, i.e., by injunction or criminal process." T. I. Emerson, The System of Freedom of Expression 670, 671 (1970). Such a suggestion does violence to the realities of news reporting and news commentary. In fact, as shown in Point II, the impact of a right-of-reply statute such as Florida Stat. § 104.38 upon newspaper reporting and editorial writing would be direct and substantial.

The Florida Supreme Court suggested (J.S. App. 12-13) that the constitutionality of right-of-reply statutes has already been implicitly upheld in a footnote in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 47 n.15 (1971) (opinion of Brennan, *J.*), which noted that "[s]ome states have adopted retraction statutes or right-of-reply statutes", and that other ways had been suggested in which the law "might encourage public discussion." This footnote did not state, and was clearly not intended to state, that all such stat-

utes would be valid under the First Amendment. It is possible, for example, that the First Amendment permits a State to encourage access to newspapers by subsidies, and other voluntary measures which involve no coercion. *See, e.g., Opinion of the Justices*, 298 N.E.2d 829, 835-36 (Mass. 1973). But, for the reasons given above, the First Amendment does not permit a State to compel a newspaper to publish what it does not wish to publish. Under this principle, Florida Stat. § 104.38 cannot stand.

II.

Florida Stat. § 104.38 Unconstitutionally Restricts the Right of Newsmen to Report and Comment on Controversial News.

Florida Stat. § 104.38, although in terms aimed only at newspapers, has a direct adverse effect upon news reporters, news commentators, and editorial writers. Their personal right under the First Amendment to communicate facts and ideas to the public through newspapers is denied to the extent that Florida Stat. § 104.38 causes newspapers not to print their articles, columns, and editorials. Accordingly, they have standing to challenge Florida Stat. § 104.38 under the First Amendment, as made applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Cf., e.g., Roe* v. *Wade*, 410 U.S. 113, 124 (1973); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925); *Truax* v. *Raich*, 239 U.S. 33, 38-39 (1915). Moreover, the First Amendment right of members of the working press to communicate facts and ideas to the public through newspapers is a right that is independent of and

in addition to the First Amendment right of newspapers to publish what they choose.

Florida Stat. § 104.38, if upheld by this Court, would have much the same impact on news reporters, editorial writers, and commentators as an outright prior restraint. It would permit political candidates to deter the publication of articles that "assail" or "attack" them by the threat of a right of reply backed by criminal sanctions. Under the First Amendment, newspapers have the right to decide what to print free from government control; news editors have a right to decide the form and content of articles free from government control; and news reporters and commentators have a right to have their articles judged by editors and newspapers free from government threats of criminal sanctions against newspapers based on the contents of their articles. Governmental attempts to restrict these rights by prior censorship have consistently been struck down as prior restraints. *See, e.g., New York Times Co.* v. *United States*, 403 U.S. 713, 714 (1971); *Near* v. *Minnesota*, 283 U.S. 697, 713-23 (1931). Florida Stat. § 104.38, which restricts the same rights, is likewise invalid under the First Amendment.

For the reasons set forth below, The Reporters Committee and the individual *amici*, who are experienced news reporters, commentators, and editorial writers, believe that Florida Stat. § 104.38 would directly and substantially restrict the publication of independent and forthright news reporting and commentary.*

* There was no opportunity to present factual materials concerning the impact that Florida Stat. § 104.38 would have upon the working press to the trial court in the present case. The complaint was served and filed on October 1, 1972, and the decision of the trial court was

A. The Impact of Florida Stat. § 104.38 Upon News Editorial Writers

Florida Stat. § 104.38 requires a newspaper to publish a reply upon request whenever it "assails the personal character" of any candidate in any primary or general election, or charges any such candidate with "malfeasance or misfeasance in office", or "otherwise attacks his official record". Such a statute would exert a constant pressure upon newspaper editorial writers, because the frequency of federal, state, and local elections is such that there would at most times be one or more candidates who would be entitled to claim the benefits of such a statute.

It is the policy of most newspapers, in connection with federal, state, and local elections, to publish editorials reviewing the issues and the qualifications of the respective candidates and endorsing those candidates who are considered to be clearly preferable to their opponents. Many candidates who are not endorsed would consider such editorials to be attacks on their "personal character" or "official record" within the meaning of Florida Stat. § 104.38. *Amici* would expect the majority of these candidates to demand the publication of replies.

This is not the full extent of the impact which a statute such as Florida Stat. § 104.38 would have on editorial writing. Many contests for public office involve at least one candidate who already holds the same or another public office. Such a candidate could demand the right to reply under a statute such as Florida Stat. § 104.38 whenever an editorial criticized any official act he took during the period

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announced on the following day (J.S. App. 31, 34). The record before the Florida Supreme Court consisted solely of the complaint with annexed exhibits and the decision of the trial court.

of his candidacy. An incumbent Governor running for re-election, for example, could presumably demand the right to reply to any editorial which criticized any action he took as Governor. In many cases, more than one candidate would have a right of reply (for example, when an editorial stated that the Mayor and the majority of the City Council were pursuing an unsound policy, or that the Governor had unwisely backed the President's policy on Vietnam).

The threat of such repeated demands for reply would cause editorial writers to eliminate many references to individual officials and candidates in the hope that this would take the editorial outside the statute, or, in many cases, not to print the editorial at all.

B. The Impact of Florida Stat. § 104.38 Upon News Commentators

News commentators often discuss the "personal character" and "official record" of individuals who are candidates for nomination or election to federal, state, or local office. In some cases they do so unfavorably, and thus might be said to "assail" or "attack" the personal character or official record of such candidates within the meaning of Florida Stat. § 104.38. In such cases the candidates would seem to have a right to reply under the statute.

Amici believe that in many cases where columns of news commentary would give rise to a right of reply, the newspapers to which the columns are syndicated would refuse to print them rather than open themselves to a right of reply. Newspapers today frequently fail to publish columns they have purchased because they consider them insufficiently balanced or too controversial. This reaction would be even

stronger in a case where the printing of the column would give rise to a reply which the newspaper would be compelled to print. In time, it is feared that many news commentators would shape columns so as to avoid giving rise to a right of reply in as many cases as possible.

C. The Impact of Florida Stat. § 104.38 Upon News Reporters

Florida Stat. § 104.38 would also have a large adverse effect upon the work of news reporters. Reporters are often called upon to report statements by candidates or other persons which criticize the personal character or official record of another candidate. The words of Florida Stat. § 104.38 are probably broad enough to give the candidate who has been criticized a right of reply in such a situation. Moreover, it is often newsworthy when a candidate makes a statement in response to facts or charges concerning his personal character or official record. In reporting such a statement, however, it is not good news practice to confine the article to the candidate's statement. To give proper context and perspective to the story, the facts or charges to which the candidate is responding must also be summarized. The words of Florida Stat. § 104.38 would at least arguably give the candidate a right of reply to the facts or charges summarized. His opponent, meanwhile, could demand the right to respond to his statement. Most of the articles written on political or governmental subjects during the course of election campaigns would be of the kind described above, and most of them would therefore call into being an arguable right of reply.

Election news must compete for space in the newspaper with news of every other kind, including, sports, society,

cinema, and other specialized kinds of news. During an election campaign, if election news carries with it the potential of repeated demands for replies, while other kinds of news involve no such problems, newspapers will print substantially less election news and substantially more other news than they would in the absence of a statute such as Florida Stat. § 104.38. A statute such as Florida Stat. § 104.38 would therefore diminish substantially the flow of news about federal, state, and local election campaigns.

III.

Florida Stat. § 104.38 Is Unconstitutionally Vague.

This Court has repeatedly held that statutory vagueness is particularly intolerable when First Amendment rights are involved. *E.g.*, *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 287 (1961); *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-07 (1940). Florida Stat. § 104.38 is vague and ambiguous in a number of fundamental respects. The Florida Supreme Court recognized the ambiguity of one of the terms used in Florida Stat. § 104.38—"any reply" the candidate may make—and decreed that this term means

> "'any reply' which is wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane." (J.S. App. 16.)

The Florida Supreme Court expressly refused on rehearing, however, to clarify any of the other terms used in Florida Stat. § 104.38, commenting that

> "In short, the definition and meaning of specific words or phrases in a particular factual situation have been and will be an infinite subject of inquiry so long as Homo sapiens engage in the art of communication." (J.S. App. 29.)

The glaring ambiguity of the statute which the Florida Supreme Court thus refused to clarify contrasts with the FCC's personal attack rule, which was upheld against a vagueness attack in *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367, 395-96 (1969). As this Court there emphasized, the FCC had published numerous rulings interpreting the personal attack rule, and had stated that it would not apply a new interpretation of the rule retroactively. Moreover, the FCC's personal attack rule is not a penal statute. In the case of Florida Stat. § 104.38, no such prior interpretations are available, and the statute envisions that it will normally be applied retrospectively in a criminal proceeding. Thus a judge of the same political party as the offended candidate, and himself elected in a political campaign, may interpret the statute when he has before him, subject to fine or imprisonment, the offending editor or publisher.

Moreover, the present statute, unlike the FCC's fairness rule, is not limited to attacks "upon the honesty, character, integrity or like personal qualities of an identified person or group". *See* 395 U.S. at 373-75. It embraces attacks on a candidate's "official record" as well as on his "personal character", thus enlarging by an indefinite but very wide extent the scope of the right of reply. Also unlike the FCC rule, Florida Stat. § 104.38 is not limited to attacks during the presentation of views on public issues; as indicated by

the statement by the Florida Supreme Court quoted on page 19 above, it applies to the contents of newspaper articles as well as editorials. This in turn makes highly indefinite the meaning of the terms "attack" and "assail" in Florida Stat. § 104.38. For example, who can say whether these terms include factual statements? Statements by others which are merely reported by the newspaper? Even replies by other candidates which the newspaper is compelled to print?

Many further ambiguities exist in Florida Stat. § 104.38, including the scope of the terms "newspaper" and "immediately", but the ambiguities discussed above are of key importance to the working press. All of these ambiguities appear in a criminal statute under which each violation is punishable by up to $1,000 fine and up to one year in prison. Florida Stat. § 104.38 is an unconstitutionally vague and unworkable statute.

CONCLUSION

For the reasons set forth above, *amici curiae* respectfully request that the Court reverse the judgment entered by the Supreme Court of Florida on October 10, 1973.

Dated: New York, New York
December 18, 1973

Respectfully submitted,

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DEC 26 1973

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In the Supreme Court of the United States

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of
KNIGHT NEWSPAPERS, INC.,
Appellant,

vs.

PAT L. TORNILLO, JR.,
Appellee.

On Appeal from the Supreme Court of Florida

APPELLEE'S RESPONSE TO APPELLANT'S JURISDICTIONAL STATEMENT AND MOTION TO AFFIRM THE JUDGMENT BELOW OR, IN THE ALTERNATIVE, TO DISMISS THE APPEAL.

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In the Supreme Court of the United States

NO. 73-797

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a division of
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APPELLEE'S RESPONSE TO APPELLANT'S JURISDICTIONAL STATEMENT AND MOTION TO AFFIRM THE JUDGMENT BELOW OR, IN THE ALTERNATIVE, TO DISMISS THE APPEAL.

Appellee, Pat L. Tornillo, Jr., moves to affirm the judgment of the Supreme Court of Florida entered on July 18, 1973, (rehearing denied October 10, 1973), which reversed a decision of the Circuit Court of Dade County, Florida and upheld the constitutionality of § 104.38, Florida Statutes. In the alternative, Appellee moves to dismiss the appeal. Pursuant to Rule 16 of the Rules of this Court, Appellee has united a motion to affirm the judgment below, in the alternative, with a motion to dismiss the appeal. The motion is made in the alternative because it is not possible at this juncture to discern from Appellant's characterization in the jurisdictional statement of the issues in this appeal whether the opinion and judgment of the Florida Supreme Court are final for purposes of 28 U.S.C. § 1257(2). This response to Appellant's Jurisdictional Statement is also submitted to show that although the appeal does raise substantial federal questions for review in this Court, some of the federal questions stated in Appellant's Jurisdictional Statement as being presented by this appeal are not, in the view of the Appellee, either raised in this appeal or relevant to it.

OPINION BELOW

The opinion of the Florida Supreme Court, dated July 18, 1973, and the opinion denying rehearing dated October 10, 1973, both still unreported, are included in the Appendix to Appellant's jurisdictional statement as is the opinion of the Circuit Court of Dade County, reported at 38 Fla. Supp. 80 (1973).

JURISDICTION

This action was brought by Appellee Pat L. Tornillo, Jr., against *The Miami Herald*. Appellee Tornillo, a candidate for the State Legislature, requested that the *Herald* print verbatim his replies to two *Herald* editorials as required by Florida Statute 104.38. The *Herald* refused to comply with Florida Statute 104.38 and would not print the replies. Appellee then instituted suit for declaratory and injunctive relief and punitive damages. On October 20, 1972, the Circuit Court for Dade County dismissed the complaint and held § 104.38, Florida Statutes, to be in violation of the First and Fourteenth Amendments to the United States Constitution, and Article I of the Florida Constitution.

On direct appeal to the Florida Supreme Court, that Court reversed the decision of the Circuit Court and upheld, 6-1, the constitutionality of § 104.38, Florida Statutes. The Supreme Court of Florida found that the operation of the Florida right of reply law, F.S. § 104.38, did not "interfere with freedom of the press as guaranteed by the Florida Constitution and the Constitution of the United States." Indeed, the Supreme Court of Florida held that Florida Statute § 104.38 was not only consistent with the Constitutional guarantee of freedom of the press but strengthened that guarantee. *The Miami Herald* filed a Petition for Rehearing, which was denied by the Supreme Court of Florida on October 10, 1973. *The Miami Herald* filed a Notice of Appeal in this Court on November 1, 1973.

The Supreme Court of the United States has jurisdiction to review the decision of a state supreme court

upholding a state statute against a claim of constitutional invalidity pursuant to 28 U.S.C. § 1257(2). Jurisdiction is conferred, however, only if the judgment below is a "final judgment." Appellant contends that the "Florida Supreme Court conclusively decided the controlling constitutional issue, and its decision, which is binding upon the trial court, is therefore reviewable by this Court." Jurisdictional Statement of Appellant, p. 3. However, the constitutional issue presented for review to the Court on appeal will only be the "controlling constitutional issue" for the trial court on remand *if statutory construction and factual defenses are conceded by Appellant.* This has not been done by Appellant. Rather than conceding such defenses, Appellant appears, in its Jurisdictional Statement, to be laying the ground work for their assertion. Thus, Appellant contends that the particular replies submitted by Appellee were unresponsive and therefore not covered by Florida statute § 104.38. Also, Appellant professes to be unclear as to the meaning of the statutory term, "attack", which brings the Florida right of reply statute into operation. Appellant raises similar cavils with regard to the length, whereabouts, and content of the reply. See Jurisdictional Statement of Appellant, p. 21.

Appellee contends that Appellant should not be allowed to assert that the judgment below is sufficiently "final" for an appeal to this Court when appellant at the same time declines to state that it would print Appellee Tornillo's replies to its editorials if the controlling constitutional issue, the constitutionality *vel non* of Florida Statute § 104.38, were decided in this Court contrary to Appellant's position. Appellant is seeking to have the opinion treated as "a little bit final." It either is final or it is not.

Appellee invites the filing of a supplemental jurisdictional statement by Appellant to the effect that if this Court affirms the judgment below and sustains the constitutionality of F.S. §104.38, Appellant will print Appellee's replies. With the submission of a concession by Appellant that the only issue remaining in the case would be the constitutional validity of Florida Statute §104.38, the decision below would indeed be a "final" judgment pursuant to 28 U.S.C. §1257(2).

An analysis of *Mills v. Alabama*, 384 U.S. 214 (1965), is instructive on what Appellant needs to do, under the decisions of this Court, if this appeal is to be viewed as satisfying the "final" judgment rule of 28 U.S.C. §1257. In *Mills v. Alabama*, 384 U.S. 214 (1965), a state supreme court judgment was held to be a "final judgment" appealable under 28 U.S.C. §1257 even though the state supreme court had remanded the case for further proceedings not inconsistent with its opinion. In that respect, the mandate to the trial court from the Alabama state supreme court in *Mills* and the mandate of the Florida supreme court to the trial court in *Tornillo* were similar.

The state of Alabama in *Mills* moved to dismiss the appeal under §1257 on the ground that the state Supreme Court judgment in *Mills* was not "final". Mr. Justice Black, speaking for this Court, however, held that the case was final even though the state's argument had a "surface plausibility":

> "[i]*t is true the judgment of the State Supreme Court did not literally end the case. It did, however, render a judgment binding upon the trial court that it must convict Mills under this state*

> *statute if he wrote and published the editorial. Mills concedes that he did, and he therefore has no defense in the Alabama trial court.* Thus if the case goes back to the trial court, the trial, so far as this record shows, would be no more than a few formal gestures leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court for it formally to repeat its rejection of Mills' constitutional contentions whereupon the case could then once more wind its weary way back to us as a judgment unquestionably final and appealable. Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets. The language of §1257 as we construed it in *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379, 381-383, does not require a result leading to such consequences. See also *Construction Laborers v. Curry*, 371 U.S. 542, 548-551; *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 72-74. Following those cases we hold that we have jurisdiction." *Mills v. Alabama*, 384 U.S. 214 at 217-218 (1966). (Emphasis supplied).

In other words, the Alabama Supreme Court judgment in *Mills* was "final" because Mills conceded that the only defense he had was a constitutional one. If the constitutional defense had been rejected by this Court, Mills would have been convicted in the trial court. But as has been pointed out, Appellant's Jurisdictional Statement in

this case, unlike the situation in *Mills*, appears to reserve a variety of nonconstitutional defenses. It may be that Appellant intends no such reservation and is quite prepared to concede that if Florida Stat. §104.38 is upheld as constitutional by this Court, it will publish the Appellee's replies. In that event, all that will be left for the trial court to do will be to order publication; just as in *Mills*, if the statute had been sustained by this Court, nothing would have been left for the trial court to do other than to hold Mills guilty under the statute. But as the matter now stands, it is not certain that the federal constitutional issue here is a "separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the Plaintiff's cause of action." *Mercantile Bank v. Langdeau*, 371 U.S. 555 at 557-558 (1963).

Appellee believes that it is necessary for Appellant to make a further statement on the question of whether they are reserving a variety of independent defenses of a factual and statutory construction nature. If a further statement from Appellant makes it clear that no such reservation of nonconstitutional issues yet remains, and the only issue that endures in this litigation is the constitutional validity of Florida Statute, §104.38, then, indeed, the decision below is a "final judgment" appropriate for review by appeal in this court pursuant to 28 U.S.C. §1257(2).

With the exception of the problem concerning the issue of finality which has been raised by Appellant's Jurisdictional Statement, the Appellee agrees that those federal constitutional issues that are presented by this appeal are clearly "substantial" and merit full review by the Supreme Court of the United States.

QUESTIONS PRESENTED

Does not Section 104.38, Florida Statutes, implement freedom of the press and due process of law guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, and freedom of speech and press guaranteed by Article I, Section 4, of the Florida Constitution, by compelling a newspaper to provide free space to a candidate in any state election to reply to any publication in the newspaper which "assails (his) personal character," or charges him with "malfeasance or misfeasance" in office, or "otherwise attacks his official record"?

Is not Section 104.38, Florida Statutes, a valid exercise of the police power of the States as guaranteed by the Tenth Amendment to the Constitution of the United States as well as a valid exercise of the power of the Florida legislature to regulate elections as authorized by Article VI, Section 1 of the Florida Constitution?

STATEMENT OF THE CASE

With one exception, the Appellee accepts the statement of the case recited in the Appellant's Jurisdictional Statement. See Jurisdictional Statement of Appellant, pp 5-7. The Appellee, Tornillo, submitted two replies in response to two editorial attacks against him by Appellant, *The Miami Herald*. Appellant's statement, however, refers only to one reply submitted to it by Tornillo. Although the *Herald* failed to publish either reply, the *Herald* only informed Tornillo of its refusal to publish the second reply.

THE QUESTIONS ARE SUBSTANTIAL

Issues Presented

It is important to identify the truly substantial federal constitutional issues presented by this appeal. Two substantial federal issues are clearly present. First, does the Florida right of reply statute restrain freedom of the press or does it serve to guarantee and implement freedom of the press? Second, is Florida Statute, §104.38, a permissible regulation of freedom of the press because of the over-riding state police power purpose of assuring fair and honest elections?

Two different issues, on the other hand, are discussed at length in Appellant's Jurisdictional Statement as raising substantial constitutional questions. The first is the issue of whether the First Amendment *of its own force* provides any rights of access and reply to the public. The second is the issue of whether the Florida right of reply statute, §104.38 is unconstitutionally vague. Appellee submits that neither presents a substantial federal constitutional issue for consideration by this Court on this appeal.

1. *The Issue of Whether the Florida Right of Reply Statute Implements or Restrains Freedom of the Press Presents a Substantial Federal Constitutional Question*

This appeal involves the constitutionality of a state right of reply statute. The validity of right of reply legislation is a substantial federal question primarily because this Court has never had occasion to explicitly pass on the validity of such legislation. Courts, legislatures, and schol-

ars have assumed, Appellee believes correctly, the validity of such legislation. Yet in the absence of a specific Supreme Court holding on the subject, the status of right of reply legislation is placed under a pall despite the obvious responsiveness of such legislation to the First Amendment goals as articulated by the Court in *New York Times v. Sullivan*, 376 U.S. 254 at 270 (1964).

> "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open * * *"

After *New York Times v. Sullivan*, 376 U.S. 254 (1964), the following critique appeared of the rationale of that decision:

> "But it is paradoxical that although the libel laws have been emasculated for the benefit of defendant newspapers where the plaintiff is a 'public official,' the Court shows no corresponding concern as to whether debate will in fact be assured. The irony of *Times* and its progeny lies in the unexamined assumption that reducing newspaper exposure to libel litigation will remove restraints on expression and lead to an informed society.' But in fact the decision creates a new imbalance in the communications process. Purporting to deepen the constitutional guarantee of full expression, the actual effect of the decision is to perpetuate the freedom of a few in a manner adverse to the public interest in uninhibited debate. *Unless the Times doctrine is deepened to require opportunities for the public figure to reply to a defam-*

atory attack, the Times decision will merely serve to equip the press with some new and rather heavy artillery which can crush as well as stimulate debate."

Barron, *Access to the Press — A New First Amendment Right*, 80 Harv.L.Rev. 1641 at 1657 (1967).

(Emphasis supplied).

The scope of the *New York Times* rule was extended progressively from the elected public official to the non-elected public official, *Rosenblatt v. Baer*, 383 U.S. 75 (1966), to the public figure, *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967). Finally, in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), the focal point of a First Amendment basis for protection for the media from libel litigation was placed on whether the alleged defamation involved public issues. This shift in the *New York Times v. Sullivan* rule from the status of the libel plaintiff to the content of the libel emphasized what previous cases in the rich case law decided under the *Sullivan* rule had hidden from view. The private citizen plaintiff who was now to be deprived of an effective libel remedy if the defamation he protected involved a public issue obviously would find it difficult to attract "media attention to counter criticism." The assumption that the libel plaintiff would be a sufficiently "public" person to defend himself in a spat with the media thus fell apart. In fact this Court, in *Rosenbloom*, per Mr. Justice Brennan, said as much:

"Thus, the unproven and highly improbable generalization that a yet defined class of 'public

> figures' involved in matters of public concern will be better able to respond through the media than private individuals also involved in such matters seems too insubstantial a need on which to rest a constitutional distinction."
> 403 U.S. 29 at 46-47.

In the light of the near demise of libel litigation as a result of the rise of the public law of libel, and in the light of the uneven contest between the search for access by both private and "public" persons assailed by powerful media foes, the plurality opinion for the Court in *Rosenbloom* suggested the efficacy of right of reply legislation as a corrective for the media overkill that the *New York Times v. Sullivan* doctrine had spawned.

It is within the context of this background that the Florida right of reply statute was sustained in the judgment below. The Supreme Court of Florida assumed that the advocacy of right of reply legislation by the plurality opinion for the Court was an implicit endorsement of the constitutional validity of right of reply legislation. See *Tornillo v. Miami Herald Publishing Co.*, Case No. 43,009, Per Curiam Slip Opinion, pp. 8-9, July 18, 1973.

Certainly there was no suggestion in Mr. Justice Brennan's plurality opinion for the Court in *Rosenbloom*, in which Chief Justice Burger and Mr. Justice Blackmun joined, of any constitutional infirmity with regard to right of reply legislation. The plurality opinion for the Court in *Rosenbloom* called upon the states to ensure the "ability to respond" of citizens who otherwise might have inadequate ability to secure publicity for their ideas. The call for such legislation would only be meaningful if its consti-

tutionality were assumed. See *Rosenbloom v. Metromedia*, 403 U.S. 29 at 47. Furthermore, in a footnote in *Rosenbloom*, the Court discussed, with apparent approval, the practice of those states which "had adopted retraction statutes or right of reply statutes." 403 U.S. 29 at 47, n. 15. Similarly, in the same footnote, the Court appeared to consider the enforcement of right of reply legislation as an appropriate task for "constitutional adjudication." In a dissenting opinion in *Rosenbloom*, Mr. Justice Harlan called attention to the implicit assumption of constitutionality which the members of this Court, who joined in the plurality opinion for the Court in *Rosenbloom*, had apparently extended to right of reply legislation. 403 U.S. 29 at 71 (1973).

Florida found itself in the *Tornillo* case with a right of reply law, enacted in 1913, which appeared to meet precisely the kind of legislative standard which the plurality opinion in *Rosenbloom* had suggested as the appropriate remedy to enable both private and public persons "to respond through the media."

Is such a statutory remedy constitutional?

There is no express holding on this point commanding a majority of this Court. As a result, the question of the validity *vel non* of the Florida right of reply statute under the First Amendment, is a substantial federal constitutional issue.

The position that any kind of compulsory publication obligation on the press is a violation of freedom of the press has secured some recent support. The Supreme Judicial Court of Massachusetts has recently held unconstitu-

tional, in an advisory opinion, a pending legislative proposal that if a newspaper published the paid political advertisement of one candidate, it must publish the paid political advertisement of all other candidates for that office. The proposed bill also would have provided if a newspaper published a paid political advertisement "designed or tending to defeat any position with respect to a question to be submitted to the voters, he must publish any paid political advertisement on any other position with respect to the same question." This provision was also declared unconstitutional. See *Opinion of the Justices to the Senate*, 298 N.E.2d 828 (Mass. 1973).

The Massachusetts Supreme Judicial Court said with respect to the validity under the First Amendment of the proposed legislation:

> "We are aware of no circumstances in which it has been held that the First Amendment right of free speech gives a private individual the right to require the publication of editorial advertising." 298 N.E.2d 828 at 833 (Mass. 1973).

The Supreme Court of Florida, on the other hand, viewed the Florida right of reply law as implementing a basic value "underlying First Amendment guarantees" which is the "broad societal interest in the free flow of information." The great distinction in terms of First Amendment values between an obligation to provide a reply and a state statute specifically restraining content was underscored by the Supreme Court of Florida:

> "The statute here under consideration is designed to add to the flow of information and ideas and

> does not constitute an incursion upon First Amendment rights or a prior restraint, since no *specified newspaper content is excluded.* There is nothing prohibited but rather it requires, in the interest of full and fair discussion, additional information."
>
> *Tornillo v. The Miami Herald*, Supreme Court of Florida, Per Curiam Slip Opinion, Case No. 43,009, p. 6, July 18, 1973.

Right of reply legislation has been perceptively and sympathetically discussed by at least one distinguished First Amendment commentator, Professor Thomas I. Emerson. See Emerson, *The System of Freedom of Expression*, 538-539 (1970). Despite Appellant's citation of Emerson in its Jurisdictional Statement, there is nothing in Professor Emerson's treatise which suggests the unconstitutionality under the First Amendment of right of reply legislation. On the contrary, Professor Emerson has written that a right of reply "would strengthen and vitalize" freedom of expression:

> "There are other devices for protecting the individual that are not only consistent with a system of freedom of expression but that would strengthen and vitalize it. The most significant is a right of reply. The advantages of this way of dealing with alleged defamatory statements have been set forth by others and will not be considered in detail here. It is sufficient to note that a right of reply could be made available in most situations in which an individual claims that false assertions (and other forms of attack on him) have been made. It is

> particularly applicable in the case of the press, where abandonment of the libel action would be felt the most. Such a procedure is the most appropriate and probably the most effective way to deal with the problem. The person attacked would have an opportunity to get his position and his evidence quickly before the public. He would have a forum in which to continue the dialogue, rather than being forced to withdraw to the artificial arena of the courtroom. The discussion would thus be kept going in the marketplace, and the issues left up to the public, which must make the final decision anyway."

Furthermore, Professor Emerson assumes that the appropriate procedure for "allowing a right of reply would probably have to be established by legislation rather than judicial decision." *Id.* at 539.

It is to be noted that in a construction of the Mississippi right of reply statute by the Supreme Court of Mississippi where the court gave very careful attention to defining the statute, the Mississippi Supreme Court was altogether silent with regard to any First Amendment objections to right of reply legislation. See *Manasco v. Walley*, 63 So.2d 91 (Miss. 1953). A close reading of the Mississippi Supreme Court's construction of the Mississippi right of reply statute demonstrates that that Court provided the statute with a gloss which was entirely consistent with First Amendment and due process standards:

> "The provisions of Section 3175, Code of 1942, are penal in their nature, and the statute should be strictly construed. Statutes creating liabilities

which did not exist at common law, 'although supposed to be founded on considerations of public policy and general convenience are not to be extended beyond the plain intent of the words of the statute." *Houston v. Holmes*, 202 Miss. 300, 32 So.2d 138, 139. The Court in interpreting a statute of this kind must look to the statute itself for the legislative intent, and the words of the statute must be given their usual and ordinary meaning. Section 3175, according to the language used, applies only in cases where the newspaper article complained of reflects upon the honesty, integrity or moral character of the candidate; and the Court cannot by judicial interpretation extend the liability imposed by the statute to cases involving other types of objectionable newspaper comment or criticism, which do not fall clearly within the language used in the statute." 63 So.2d 91 at 96 (1953).

Mississippi and Florida are presently the only American States having right of reply statutes.

The general approach to right of reply legislation by scholars and courts has been to assume the constitutionality of such legislation. It is important to bear in mind that legislation in aid of First Amendment values is not unusual. *Furthermore, it should be emphasized that the press has occasionally favored such legislation.*

There is an ambivalent aspect to the print media's claim that legislation in aid of First Amendment values is unconstitutional. The strength of print media feeling on the subject of this litigation is demonstrated by the num-

ber of amicus briefs filed in this Court and the Supreme Court of Florida on behalf of newspapers and other media. The fact is that the print media has been somewhat two-faced on the subject of the constitutionality of governmental legislation in aid of a free press. There is a bogus quality to much of the newspaper clamor on the subject of right of reply legislation. This is demonstrated by the widespread newspaper support for the Newspaper Preservation Act, 15 U.S.C. §1801. As a result of that legislation enacted by Congress in 1970, 22 cities were allowed to set joint advertising subscription rates which might otherwise be deemed to have violated the antitrust laws. One of the newspapers directly benefiting from this governmental legislation aiding the press is the Appellant, *The Miami Herald*, which has been party to a joint operating agreement since 1966 and is therefore one of the most conspicuous beneficiaries of government largesse under the Newspaper Preservation Act.

For a list of the various agreements protected by the Act and the date the agreements became effective, see 116 Cong. Rec. 1783 (1970).

What is the legislative policy behind the Newspaper Preservation Act's exemption from the anti-trust laws for pre-existing joint operating rates between newspapers in the same community? The justification is that an anti-trust violation should be excused in the interest of encouraging diversity of opinion by preserving two separate editorial voices in a community. If government legislation to preserve editorial diversity in a city is constitutional, state right of reply legislation designed to encourage debate and accurate information in the daily press with regard to political contests is also constitutional. Surely,

one of the legal ironies of contemporary First Amendment litigation is the furious assault by the Appellant and its kindred chain newspapers throughout the country on the judgment below sustaining Florida's statutory right of reply legislation when the Appellant is itself one of the principal beneficiaries of legislation designed to aid the press in order to serve debate:

> "If passage of the failing newspaper act was rooted in a concern that as many communities as possible should continue to have two editorial pages to read, then the Newspaper Preservation Act is federal legislation designed to provide for diversity of opinion. But if Congress has constitutional power to enact legislation to encourage diversity of viewpoint in the press, then Congress can enact legislation to give readers rights of access to the press. The scope of legislation to assure diversity of expression cannot fairly or logically be limited to serving the interests of publishers to the exclusion of the newspaper public."
>
> Barron, *Freedom of the Press for Whom?* pp. 18-19 (Indiana University Press, 1973).

Right of reply legislation is no more or less unconstitutional than is the Newspaper Preservation Act. (The Newspaper Preservation Act was recently sustained against a constitutional challenge.) See *Bay Guardian Company v. Chronicle Publishing Co.*, 344 F.Supp. 1155 (N.D.Calif. 1972).

The key to distinguishing legislation which serves First Amendment ends from legislation which does not is whether discussion is enhanced or inhibited by the legislation in question. Recently, a three judge district court invalidated §104(b) of the Federal Election Campaign Act which prohibits certain media advertising on behalf of candidates for federal office unless the candidate certifies that the cost of such advertising will not exceed campaign spending limit. *ACLU v. Jennings*, United States District Court for the District of Columbia, November 14, 1973, 42 LW 2261. The three judge federal court invalidated the statute and the regulations under it as facially unconstitutional. The three judge court said:

> "*A major purpose of the First Amendment is to protect the free discussion of governmental affairs. This includes discussions of candidates, and all matters relating to political processes. Any attempt to limit the free unfettered dissemination of individual opinion cannot be favorably viewed.*" (Emphasis supplied).

The Florida right of reply statute "protects the free discussion of governmental affairs." The substantial federal constitutional issue for resolution by this Court is whether legislation such as §104.38, Florida Statutes, violates the First Amendment, as Appellant contends, or implements it, as Appellee believes.

2. *The Question of Whether Florida Statute, §104.38, Is a Permissible Regulation Of Freedom of the Press Because of the Over-riding State Police Power Purpose of Assuring Fair and Honest Elections Presents a Substantial Federal Constitutional Issue*

An exercise of police power of the State under the Tenth Amendment is particularly appropriate when state legislation involved is designed to assure the integrity of the state electoral process. As the Florida Supreme Court pointed out in its decision in the judgment below, "Article III, Section 26, and Article VI, Section 9, Constitution of Florida, 1885, commanded the Legislature to pass laws 'regulating elections and prohibiting under adequate penalties, all undue influence thereof from power, bribery, tumult or other improper practices' and to 'enact such laws as will preserve the purity of the ballot given under this Constitution.'" Pursuant to this state constitutional mandate, the right of reply statute here at issue was enacted:

> "The statutory provision, the constitutionality *vel non* which is being questioned in the instant cause, was enacted not to punish, coerce, or censor the press but rather as a part of a centuries old legislative task of *maintaining conditions conducive to free and fair elections.* The Legislature in 1913 decided that owners of the printing press had already achieved such political clout that when they engaged in character assailings, the victim's electoral chances were unduly and improperly diminished. To assure fairness in campaigns, the assailed candidate had to be provided with an equivalent opportunity to respond; otherwise not only the candidate would be hurt *but also* the people would be deprived of both sides of the controversy."

Tornillo v. The Miami Herald Publishing Co., Supreme Court of Florida, Case No. 43,009, Per Curiam, Slip Opinion, pp. 3-4, July 18, 1973

Even if the Florida right of reply statute were regarded as an infringement of freedom of the press (albeit Appellee believes the statute to be an implementation thereof), there is no question that the statute is a constitutionally permissible infringement. Regulation of the press on behalf of the undoubted police power interest of the state in assuring free and fair elections is not an unusual doctrine. Other state supreme courts have upheld state regulation of the press when the purpose of the legislation at issue was designed to protect the integrity of the electoral process. In *Chronicle Gazette Publishing Co. v. Attorney General*, 94 N.H. 148, 48 A 2d 478 (1946), appeal dismissed 329 U.S. 690 (1947), the Supreme Court of New Hampshire upheld a state statute which provided that the rate for political advertising in newspapers should not be in excess of the rates charged for commercial advertising. Speaking for the New Hampshire Supreme Court, Mr. Justice Kenison said:

> "It is not necessary to consider the extent to which such legislation may go but so long as it does involve expression or censorship, the regulation of newspapers is as broad as that over * * * private business." 94 N.H. at 153, 48 A.2d at 482.

The common thread that unites the *Chronicle* case and this case is that neither the statute reviewed by the New Hampshire Supreme Court nor the statute reviewed by the Florida Supreme Court in any way restricted news-

paper content. Both statutes were enacted to aid political expression. The Florida right of reply statute enjoys the fortunate constitutional status of being a legitimate exercise of the state police power which also serves First Amendment objectives. The Florida right of reply statute has as its legislative purpose the same compelling and over-riding state purpose that underlies the whole Florida election code: fair, honest, and informed elections.

But it should be borne in mind that even if this Court were to take the view that legislation designed to implement First Amendment values is nonetheless impermissible under the First Amendment, the Florida right of reply statute would still be valid because of the strength of the police power purpose which animates it. In such circumstances, even if an infringement on First Amendment values were held to have occurred, the infringement would be deemed an incidental one and the compelling state interest in providing the electorate with both sides of a dispute between the press and a political candidate during a campaign would prevail. An incidental restraint on freedom of expression will be sustained where a compelling governmental interest can be demonstrated. *Gibson v. Florida Legislative Committee*, 372 U.S. 539 (1963); *Konigsberg v. State Bar*, 366 U.S. 36 (1961).

Examples of statutory regulation of the press abound. Such regulation falls into at least eight categories with respect to state legislation impinging on freedom of the press. This legislation relates to (1) paid political advertisements, (2) anonymous publicity, (3) legislative publicity, (4) lotteries, (5) polling places, (6) divorce, (7) retraction, (8) and crimes involving sex.

The test of the First Amendment validity of such legislation is the strength of the state police power interest which is involved in the particular statutory regulation of the press. Relevant to this point is *Opinion of the Justices to the Senate*, 298 N.E.2d 828 (Mass. 1973), where the Massachusetts Supreme Judicial Court invalidated a statute compelling publication of all paid political ads running for a particular office, where one such paid ad for a candidate for that office had been published.

One of the reasons the Supreme Judicial Court of Massachusetts gave for invalidating the proposed political advertising legislation presented to it for an advisory opinion, was that the bill appeared to the Court to go beyond any legitimate police power interest:

> "The situation at which §39A is directed may be the "monopolistic" status of certain news publications. However, compulsion to publish all responsive political advertisements, applicable to all newspapers and other publications of general circulation in the Commonwealth, *goes beyond what is essential to the furtherance of any interest of a State in its citizens having a right of access to newspapers in order to express, at their expense, political ideas which otherwise would not be published.* See Barron, *Access to the Press — A New First Amendment Right*, 80 Harv.L. Rev. 1641, 1676-1678. Indeed, no set of circumstances may exist which would support a legislative mandate that a newspaper or other publication of general circulation must publish a political advertisement. The views expressed and implied in the opinion of the court and in the dis-

senting opinions in the *Pittsburgh Press Co. case, supra*, create substantial doubt that such legislation would pass constitutional muster."
298 N.E.2d 828 at 835 (1973).

The passage cited by the Supreme Judicial Court of Massachusetts in Barron, *Access to the Press — A New First Amendment Right*, 80 Harv. L. Rev. 1641 at 1676-1678 (1967), emphasizes the need to develop a contextual approach in enforcing a right of access, appropriate to the needs of each state as its legislature envisioned them.

> "The right of access might be an appropriate area for experimental, innovative legislation. The right to access problems of a small state dominated by a single city with a monopoly press will vary, for example, from those of a populous state with many cities nourished by many competing media. These differences may be more accurately reflected by state autonomy in this area, resulting in a cultural federalism such as that envisaged by Justice Harlan in the obscenity cases."

Id. at 1676.

> "Utilization of a contextual approach highlights the importance of the degree to which an idea is suppressed in determining whether the right to access should be enforced in a particular case."
> *Id.* at 1676-1678.

These ideas comport well with the new emphasis on federalism that has recently been accorded by this Court to the obscenity area. *Miller v. California*, 93 S.Ct. —, 36 L.Ed.2d 419 (1973).

The obscenity analogy highlights the validity of right of reply legislation. The task of courts construing obscenity legislation is to ascertain whether publications should be suppressed. The task of the courts in the area of right of reply and access legislation is whether opinions which have been suppressed should come to light. The latter task should certainly be considered more congenial to First Amendment purposes:

> "That an emerging right of access can, at least to begin with, best be handled in the courts is supported by analogues in other sensitive constitutional areas. For example, in *Jacobellis v. Ohio* the Supreme Court squarely held that the question of what is "obscenity" is a constitutional question to be decided by judges rather than government administrators or juries. Relying on Lockhart and McClure's observation that judges have no special qualities which entitle them to choose which "movies are good or bad for local communities," the Court nevertheless supported the following conclusion about judges:
>
> > But they [the judges] do have a far keener understanding of the importance of free expression than do most government administrators or jurors, and they have had considerable experience in making value judgments of the type required by the constitutional standards

> for obscenity. If freedom is to be preserved, neither government censorship experts nor juries can be left to make the final effective decisions restraining free expression. Their decisions must be subject to effective, independent review, and we know of no group better qualified for that review than the appellate judges of this country under the guidance of the Supreme Court.

In holding in *Jacobellis* that obscenity is a question of constitutional law of the highest order, the Court really accepted the views on this point which had been argued by Mr. Justice Harlan in *Roth v. United States:*

> Every communication has an individuality and "value" of its own. The suppression of a particular writing or other tangible form of expression is, therefore, an *individual* matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for *itself* whether the attacked expression is suppressible within constitutional standards.

If the suppression of a communication on grounds of obscenity is a question of such constitutional significance that it insists on judicial treatment, then certainly the issue of whether a particular group ought to be permitted an opportunity for expression — for participation in the life of ideas — is also a question solvable by judges."

Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 Geo. Wash. L. Rev. 487 at 495-496 (1969).

Right of reply legislation, like obscenity legislation, is an appropriate exercise of the state police power. The substantial federal constitutional question presented for this court is whether, assuming that §104.38, Florida Statutes, constitutes an impingement on freedom of the press, the state interest in the statute is a compelling one. It should be noted that the Massachusetts Supreme Judicial Court, although it struck down a compulsory publication statute, apparently left the door open for the consideration of right of access legislation justified by a compelling state interest. See *Opinion of the Justices to the Senate*, 298 N.E.2nd 828 at 835 (Mass. 1973). (See italicized portion at page 24, *supra*.)

The substantial federal constitutional issue presented to this Court is whether Florida's right of reply law is justified by a compelling state interest. The difference between the Massachusetts proposed statute and the Florida right of reply statute is that the right of reply statute is invoked only when the paper itself has launched an attack on the candidate. When the power, prestige and influence of a powerful daily is launched against a candidate for office, the problem of his inability to respond is far greater than when the paper decides to sell an ad to his opponent but not to him. On the subject of media power and individual inability to respond to it the Supreme Court of Florida's observations in justification of the police power and the First Amendment validity of §104.38 as applied to the facts in this case are significant and relevant:

"The right of the public to know all sides of a controversy and from such information to be able to make an enlightened choice is being jeopardized by the growing concentration of the ownership of the mass media into fewer and fewer hands, resulting ultimately in a form of private censorship. Through consolidation, syndication of radio and television stations and the demise of vast numbers of newspapers, competition is rapidly vanishing and news corporations are acquiring monopolistic influence over huge areas of the country. *We take note of a recent article in Florida Trend magazine, March 1973, explicating that the Miami Herald is the largest newspaper published in Florida, that it is larger in size than the next two largest newspapers; and that it is not only a large city daily newspaper but also is a regional and international newspaper.*

Freedom of expression was retained by the people through the First Amendment *for all the people* and *not merely for a select few.* The First Amendment *did not create a privileged class* which through a monopoly of instruments of the newspaper industry would be able to *deny to the people the freedom of expression* which the First Amendment guarantees."

Tornillo v. Miami Herald, Supreme Court of Florida, Case No. 43,009, Per Curiam, Slip Opinion, pp. 6-7, July 18, 1973. (Emphasis added)

In *Branzburg v. Hayes*, 408 U.S. 665, 96 S.Ct. 2646 (1972), the Supreme Court held that the First Amendment did not provide of its own force either an absolute or qualified privilege authorizing newsmen to refuse to testify before a grand jury. But the fact that the First Amendment did not authorize judicial creation of newsmen's privilege did not mean that the states were not free to enact newsmen's shield statutes. Appellant's Jurisdictional Statement assumes first, that the First Amendment does not permit the judicial creation of a right of access, and, second, that, therefore, it follows that a statutory right of reply is unconstitutional. The first assumption involves an issue not raised by this appeal. The second assumption is not supported by American constitutional law or by traditional legal logic. The statement of the scope under the police power accorded the states to fashion newsmen's shield or privilege legislation by this Court in *Branzburg* is entirely descriptive of the constitutional propriety and legitimacy of right of reply legislation:

> "At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to address the evil discerned and, equally important, to re-fashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we

are powerless to erect any bar to state courts responding in their own way and construing their own constitutions so as to recognize a Newsmen's privilege, either qualified or absolute." 96 S.Ct. 2646 at 2669 (1972).

Even if right of reply legislation be deemed a First Amendment impingement, legislation affecting the press to secure an over-riding state interest under the police power has long been sustained. Moreover, right of reply statutes like newsmen's shield statutes have the additional constitutional merit of being legislation designed to enhance rather than diminish the flow of information.

In summary, the question of whether Florida's right of reply law is a valid exercise of the state police power, consistent with the First Amendment, presents this Court with a substantial federal constitutional issue. A clear resolution of that issue in favor of the validity of such legislation would do much to alleviate the "chilling effect" on the future of a limited statutory right to free debate. The future of such legislation has been clouded by exaggerated and hostile media publicity with regard to decision of the Florida Supreme Court's decision sustaining §104.38 as valid under the First Amendment.

3. *Questions of Whether the Fairness Doctrine Applies to the Press Or Whether the First Amendment of Its Own Force Provides the Public With Rights of Access and Reply to the Press Are Not Raised by This Appeal And Do Not Present This Court With a Substantial Federal Constitutional Issue For Resolution At This Time*

The issues in this appeal are difficult and sufficiently complex without the addition of issues not in the case and, without placing in the mouth of Appellee, arguments he has never made. For example, Appellant says "Tornillo has sought to bring himself within the ambit of the Federal Communications Act's fairness doctrine and the personal attack rules of the Federal Communications Commission, urging that these doctrines can and should be applied to newspapers." Jurisdictional Statement of Appellant, p. 8. Nowhere in his briefs or pleadings before the Florida Courts has Tornillo made any such claim. He has predicated his right to reply solely on the Florida statute which gives him such a right. Clear understanding of the issues involved here is not aided by inflating Appellee's legal position to cover issues not involved in this litigation. Where reference has been made to the fairness doctrine and its corollary, the personal attack rules, it has been solely for purposes of analogy to demonstrate that where the legislation by statute has provided a structure for debate, the First Amendment is not inhibited but implemented. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

Appellant asserts that the *per curiam* decision of the Supreme Court of Florida upholding the Florida right of reply statute, Sec. 104.38, Florida Statutes, is in conflict with prior cases in this and other courts. Thus, Appellants contend that the Florida right of reply statute is "in fundamental and irreconcilable conflict with the principles underlying this Court's decision in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 411 U.S. ____, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973)."

Even the most cursory analysis makes it impossible to view the *CBS* case and the *Tornillo* case as in conflict. One case, the *Tornillo* case, involves a limited right of reply set forth in a statute. The circumstances for the application of the right of reply conferred by the statute are carefully circumscribed. Moreover, the statute has now had the benefit of a precise, limiting and authoritative judicial gloss by the highest Court of the state.

In the *CBS* case, at least as the FCC and the Supreme Court viewed the issues, nothing in the federal statutes or in FCC decisions or regulations justified the recognition of a limited right of access to public television time. In other words, the access to editorial advertising claim was grounded on the First Amendment itself, there was no statute providing access rights. In fact, the constitutional future of a limited right of access to the broadcast media was obviously kept open by the plurality opinion for the Court in *CBS*. Chief Justice Burger specifically said for the Court that the issue of constitutionality of a regulation or statute conferring a limited right of access to editorial advertising was left unresolved. In fact, the absence of a statute in the *CBS* case was one of the touchstones of decision in that case and it is surprising that in all of Appellant's extensive references to the case they never mentioned this distinguishing factor.

> "We do not read the question whether the First Amendment or the Act can be read to preclude the Commission from determining that in some situations the public interest requires licensees to re-examine their policies with respect to editorial advertisements. *The Commission has not yet made such a determination;* it has, for the

> present at least, found the policy to be within the sphere of journalistic discretion which Congress has left with the licensee."
>
> *CBS v. Democratic National Committee*, 411 U.S. —, 93 S.Ct. 2080 at 2094 (1973).

Appellants similarly rely on *Chicago Joint Board, Amal. Workers v. Chicago Tribune*, 435 F.2d 470 (7th Cir. 1970), where judicial recognition was denied to a right of access, predicated on the First Amendment, to publish an editorial advertisement submitted by a union with regard to its version of a labor dispute. Appellant says the *Chicago Joint Board* case and the *Tornillo* case involve "essentially similar" arguments. This is not true. As Judge Marowitz said in the lower court opinion which was offered in *Chicago Joint Board:*

> "If, in fact, concentrations of private media power are stultifying, the appropriate approval to secure a *right of access would be by 'experimental innovative legislation'* or Constitutional Amendments."
>
> *Chicago Joint Board, Amalgamated Clothing Workers of America, AFL-CIO v. Chicago Tribune*, 307 F.Supp. 422 (N.D.Ill. 1969).
> (Emphasis supplied.)

On appeal, the Court of Appeals in *Chicago Joint Board* directed its attention to the issue of whether the First Amendment of its own force provided any right of access to the press. Intriguing and complicated as that issue may be, it is not an issue in this proceeding. The issue herein is far narrower and more parochial. It is

whether a state statute, enacted within the sphere of the legitimate exercise of state police power and designed to insure the integrity of the state electoral process, which gives a limited right of reply in the press to political candidates who have been attacked therein, offends or implements the First Amendment.

Every single case which Appellant cites as being in conflict with the decision below is a case where an access argument rested on the First Amendment itself and where the argument was resisted vis-a-vis the privately-owned press because of the state action problem. The truth is that the only case cited in Appellant's Jurisdictional Statement which even involves a right of reply statute is *Manasco v. Walley*, 63 So.2d 91 (Miss. 1953), a case where the Mississippi Supreme Court implicitly upheld the constitutionality under the First Amendment of its right of reply statute. *Manasco v. Walley, supra*, p. 96.

The issue of whether the First Amendment should by judicial interpretation be utilized to provide a right of access to the press is a fascinating and difficult constitutional issue. But it is not an issue involved in this litigation. The substantial federal constitutional here is the validity *vel non* of the Florida right of reply law, §104.38, Florida Statutes.

4. *Appellant's Vagueness Objections to §104.38, Florida Statutes, Do Not Present a Substantial Federal Constitutional Question*

Appellant contends that §104.38, Florida Statutes, is unconstitutionally vague and ambiguous. The Supreme Court of Florida has adequately and curatively responded to these contentions. In the light of the interpretive gloss

put on the statute in controversy by the judgment below, challenges to the statute based on vagueness and statutory ambiguity simply do not constitute substantial federal questions. The Supreme Court of Florida held that the Florida right of reply statute was sufficiently explicit to inform those who were within the reach of the statute to be able to ascertain the conduct necessary on their part to avoid the ban of the statute. In an effort to meet overbreadth and vagueness contentions, the Supreme Court of Florida gave the following definitive interpretation to the statute:

> "Because of the longstanding policy of this Court to give a statute, if reasonably possible, a construction supporting its constitutionality, we hold that the mandate of the statute refers to 'any reply' which is wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar, nor profane." *Tornillo v. The Miami Herald Publishing Co.*, Supreme Court of Florida, Case No. 43,009, Slip Opinion, Per Curiam, p. 10, July 18, 1973.

After the decision of the Supreme Court of Florida was announced in the *Tornillo* case, Appellant, joined by many other newspapers, who filed amicus curiae briefs, filed a petition for rehearing with the Supreme Court of Florida. Appellant contended in its petition for rehearing that §104.38 was a criminal statute and as such that it failed to meet the constitutional standards of precision required of such statutes. Appellant argued on rehearing that the Supreme Court of Florida lacked constitutional power to furnish a saving gloss to a criminal statute.

Appellant also returned to its general contentions about vagueness saying that the statute presented problems of construction which the Supreme Court of Florida left unanswered. The Supreme Court of Florida denied the petition and pointed out that "no criminal penalty" was sought by Tornillo and that "the validity *vel non* of the criminal penalty is not here involved." *Pat L. Tornillo, Jr. v. The Miami Herald Publishing Company*, Case No. 43,009, Petition for Rehearing, Slip Opinion, p. 2, October 10, 1973. The Supreme Court of Florida also pointed out that in order to give a savings construction to a statute the criminal sanction provisions of a statute could be severed if this were necessary to save the statute from constitutional infirmity. For this proposition the Supreme Court of Florida cited the leading First Amendment case of *Gitlow v. People of New York*, 268 U.S. 652 (1925).

On the petition for rehearing, the Supreme Court of Florida addressed itself to the Appellant's hypothetical questions concerning the interpretation of the statute, *i.e.*, What is a response? An assault? "A conspicuous place"? etc. First, the Supreme Court of Florida pointed out in effect that the definition of words in a statute will always be a matter of mystery to those in whose interest it is to profess to be perplexed. Yet the Supreme Court of Florida remarked on the marvelous ability of the Florida newspaper industry to understand completely similar statutory phraseology when such understanding was in its interest. Thus, the Supreme Court of Florida pointed out that Florida has a retraction statute, §770.02, Florida Statutes, as do many other states, and that the Florida retraction statute contains words such as "good faith", "falsity", "a full and fair correction", "apology", and "conspicuous place." Nevertheless, the Florida retraction statute has had suffi-

cient clarity to have frequently been used by Florida publishers to avoid punitive damages. The Florida retraction statute, §770.02, contains similar phraseology to that found in the Florida right of reply statute, §104.38. The retraction statute involves compulsion no less than the right of reply statute. The choice given to the publisher is that between publication of retraction or the assessment against him of punitive damages. Yet the constitutionality of retraction statutes is generally assumed:

> "The constitutionality of the Minnesota (retraction) law has been sustained, *Allen v. Pioneer Press Co.*, 40 Minn. 117, 41 N.W. 936 (1889), while some state statutes have been declared unconstitutional. *Hanson v. Krehbiel*, 68 Kan. 670, 75 P. 1041 (1904). Courts which have regarded retraction laws unfavorably have done so because they believe the general constitutional protection of life, liberty and property prohibit such laws, the defamed person is denied a speedy recovery for injury to his reputation, and, more important, retraction statutes represent class legislation favoring the press and denying the equal protection of the laws."
>
> Gillmor and Barron, *Mass Communication Law* 279 (1969).

It is thus to be noted from this excerpt that such attacks as have been launched against state retraction statutes have not been of a vagueness nature. In short, Appellant's vagueness objection to the Florida right of reply statute, which contains similar phraseology to that employed by the Florida retraction statute, does not raise a substantial federal constitutional issue.

CONCLUSION

Appellant seeks to undercut the clear police power justification for the Florida right of reply statute, the legitimate state interest in ensuring free, fair and honest elections, by relying on *Mills v. Alabama*, 384 U.S. 214 (1966), for the proposition that such a state interest cannot justify a First Amendment resolution of the kind they believe §104.38 to constitute. Thus appellant asserts:

> "This Court held in *Mills v. Alabama*, *supra*, that the reasonableness of a state's interest in fair elections cannot justify a criminal statute restricting the contents of a newspaper. *Mills* was ignored by the Supreme Court of Florida."
> Jurisdictional Statement of Appellant, p. 16.

These contentions are incorrect for a variety of reasons. First of all, as has been made clear by the court below, no criminal provisions of §104.38 are involved in or raised by this appeal. Second, and most important, the Florida right of reply statute unlike the statute in *Mills* does not involve "restricting the contents of a newspaper."

Mills v. Alabama, *supra*, is completely consistent with the decision below. The following discussion of *Mills v. Alabama* is cited to illustrate that legislation which enhances free press implements the First Amendment and does not violate it:

> "A recent United States Supreme Court case, *Mills v. Alabama*, 384 U.S. 214 (1966), places new significance on opportunity for reply in the press and thus provides by implication new sup-

port for a statutory right of access to the press. In *Mills*, as in *Chronicle*, the state legislature had regulated newspapers under a state corrupt practices act. The Alabama statute, Ala. Code Tit. 17, §285 (1958), made it a criminal offense to electioneer or solicit votes 'on the day on which the election affecting such candidates or propositions is being held.' The *Birmingham Post Herald*, a daily newspaper, carried a very strong editorial urging the electorate to adopt a mayor-council form of government in place of the existing commission form. The editor of the newspaper, who had written the editorial, was arrested on a charge of violating the statute. The trial court sustained a demurrer to the complaint, but the Supreme Court of Alabama reversed on the ground that reasonable restriction of the press by the legislature was permissible.

In reversing this decision, Justice Black's opinion for the Supreme Court was based on the familiar concept that the press is a kind of constitutionally anointed *defensor fidei* for democracy, 384 U.S. at 219:

The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.

Mr. Justice Black observes that insofar as the Alabama statute is construed to prohibit the press from praising or criticizing the government, it frustrates the informing function of the press. But all this is familiar theory. What makes the *Mills* case something of a departure, and in its own way quietly original, is an interesting commentary by Justice Black. In rebutting Alabama's claim that the legislature's aim was a constitutionally permissible one—to purge the air of propaganda and induce momentary reflection in a brief period of tranquility before election day—Justice Black suggested that this argument failed on its own terms since 'last-minute' charges could be made on the day before election and no statutory provision had been made for effective answers, *Id.* at 220: 'Because the law prevents any adequate reply to these charges, it is wholly ineffective in protecting the electorate 'from confusive last-minute charges and counter-charges."

This statement suggests a substitution of the sensitive query 'Does the statute prohibit or provide for expression?' for the more wooden and formal question 'Does the statute restrain the press?' It is of course clear that *Mills* did not grant a constitutionally endorsed statute to legislative or judicial provisions conferring a right of access to assure debate. Quite the contrary, Justice Black prefaced his discussion of the significance of lack of opportunity to reply to 'last-minute' charges with the remark that the state's argument about the reflective intent of the statute is illogical '*even if it were relevant* to the con-

stitutionality of the law.' But it is the writer's contention that the existence of adequate opportunity for debate, for charge and countercharge, is an extremely relevant consideration in any determination of the constitutionality of legislation in this area. Justice Black's inquiry into the pragmatics of debate is an encouraging step in this direction."

Barron, *Access to the Press — A New First Amendment Right*, 80 Harv.L.Rev. 1641 at 1672-73 (1967).

In summary, assuming that the doubts that have been placed on the "finality" of the judgment below by Appellant's jurisdictional statement can be removed by the filing of a further statement by Appellant, the federal constitutional issues presented by this appeal are substantial. Accordingly, Appellee moves this Court, after a full consideration of the federal constitutional issues involved, to affirm the judgment below, or in the alternative, in the event "finality" problems are not absolutely resolved, to dismiss this appeal.

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CERTIFICATE OF SERVICE

I, TOBIAS SIMON, as a member of the Bar of the Supreme Court of the United States, hereby certify that a true and correct copy of the foregoing Appellee's Response and Motion to Affirm Judgment or Dismiss the Appeal, was mailed by U.S. Mail this 14th day of December, 1973, to PAUL & THOMSON, Attorneys for Appellant, 1300 First National Bank Building, Miami, Florida 33131.

TOBIAS SIMON

DEC 28 1973

MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,

Appellant,

vs.

PAT L. TORNILLO, JR.,

Appellee.

On Appeal from the Supreme Court of Florida

BRIEF AMICUS CURIAE FOR CHICAGO TRIBUNE COMPANY, GORE NEWSPAPERS COMPANY AND SENTINEL STAR COMPANY IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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May It Please The Court:

This amicus brief is submitted on behalf of the Chicago Tribune Company, Gore Newspapers Company and the Sentinel Star Company in support of the appellant. Consent to the filing of this brief has been obtained from both the appellant and appellee pursuant to Rule 42(1).

INTEREST OF AMICI.

Amicus Chicago Tribune Company publishes the *Chicago Tribune*, one of the nation's largest metropolitan daily and Sunday newspapers. Amici Gore Newspapers Company and the Sentinel Star Company are publishers of leading metropolitan daily and Sunday newspapers in southern and central Florida, *i.e.*, the *Fort Lauderdale News* and *Sun-Sentinel* in Fort Lauderdale and the *Orlando Sentinel-Star* in Orlando, respectively.[1]

The *Chicago Tribune* has a long and well known practice of appearing in litigation involving attempted encroachments upon freedom of the press. See, *e.g.*, *Near* v. *Minnesota*, 283 U.S. 697 (1930); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Associated Press* v. *Walker*, 388 U.S. 130 (1966); *City of Chicago* v. *Tribune Co.*, 307 Ill. 595, 139 N.E. 86 (1923).

All three amici are deeply and vitally concerned over the impact and far-reaching First Amendment implications of the decision below sustaining the Florida "right of reply" statute. Gore Newspapers Company and the Orlando Sentinel Star Company as Florida newspaper publishers are directly and immediately affected by the statute; if it is permitted to stand, they will face the choice of attempting to comply with the statute under pain of both criminal and civil sanctions, or to print nothing that is critical of political candidates.

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[1] The three named *amici* are all subsidiaries of Tribune Company, a Delaware corporation having its headquarters and principal place of business in Chicago, Illinois.

The *Chicago Tribune,* although predominantly distributed in the metropolitan area of Chicago, also circulates in Florida. The Florida "right of reply" statute does not distinguish betwee in-state and out-of-state newspapers Moreover, the *Chicago Trbune* enjoys circulation in all other States of the Union; if the Florida statute is allowed to stand many other States may well adopt it, thereby expanding *ad infinitum* the possible criminal and civil exposure of the *Chicago Tribune* for claimed violations.

STATUTE INVOLVED.

The Florida "right of reply" statute (Section 104.38, Florida Statutes) provides:

> *"Newspaper assailing candidate in an election; space for reply.*—If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083."[2]

[2] A "misdemeanor of the first degree" is punishable by a jail sentence of up to one year and a fine of up to $1,000.00. (§§775.082, 775.083, Florida Statutes.)

ARGUMENT.

Originally enacted in 1913, the Florida "right of reply" statute has lain ignored and dormant on the books for over sixty years, not unlike a creature of fiction that everyone thought dead. The fact that it has now been resurrected and revived with utmost seriousness by appellee Tornillo and the Florida Supreme Court is, we think, almost stranger than fiction itself, and certainly more terrifying to publishers and all others who value First Amendment freedoms.

The *Miami Herald's* Jurisdictional Statement amply demonstrates the conflict between the decision below and the past holdings of this Court under the First and Fourteenth Amendments.[5] We shall not duplicate that discussion, but instead shall focus upon the total contradiction between the Florida "right of reply" statute and the First Amendment when mirrored against its history. We believe that a glimpse into the past highlights the fact that the Florida statute is an instrument devised by the censor.

I.

THE FLORIDA "RIGHT OF REPLY" STATUTE IS DIAMETRICALLY OPPOSED TO THE HISTORY AND ESSENCE OF FIRST AMENDMENT FREEDOM OF THE PRESS.

The struggle for freedom of the press has always had as its storm center the issue of what the press may freely publish about the government and those who govern or

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[5] *E.g., Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973); *Mills* v. *Alabama*, 384 U.S. 214 (1966); *Ashton* v. *Kentucky*, 384 U.S. 195 (1966).

wish to govern. Indeed, at the risk of oversimplifying, we submit that the quintessence of our First Amendment free press heritage is the right to print or not print whatever is desired about government and politics without official restraint, compulsion or reprisal.

A. Suppression Prior to the First Amendment.

History records that for centuries there was no freedom to publish anything about governmental affairs. The tyrants and dictators of Rome and Medieval Europe strictly prohibited any verbal or written "newsmongering" among the people about matters of government, under pain of immediate torture or death. See Arthur & Crosman, *Law of Newspapers*, p. 2 (2d Ed. 1940); Thayer, *Legal Control of the Press*, pp. 6-8 (3rd Ed 1956). In England, the prohibition was codified in 1274 by the enactment of *De Scandalis Magnatum*, (3 Edw. I, c. 34); this edict outlawed any and all spoken or written utterances deemed remotely critical of the Crown or any men of the realm. See I Hallam, *Constitutional History of England*, pp. 36-45 (5th Ed. 1841); II Stephen, *A History of the Criminal Law of England*, p. 350 (1883).

After the printing press first appeared in England in 1476, its dramatic potential as a means of politically informing and arousing the people was soon recognized. The enforcement of *De Scandalis Magnatum* was accordingly vested in the notorious Court of Star Chamber, and the crime of seditious libel was expanded to include "even the thoughts of men, who should by words, writing, imprinting, or any other exterior act, directly or indirectly, judge or believe contrary to the royal pleasure." Thayer, *Legal Control of the Press*, p. 9 (3rd Ed. 1956). The Star

Chamber was of royal prerogative and not bound by any rules; a "trial" in the Chamber for seditious libel was a farce and a prelude to flogging, mutilation, branding, pillorying and gargantuan fines and prison terms. Siebert, *Freedom of the Press in England, 1476-1776*, pp. 121-22 (1952); Burn, *The Star Chamber*, Preface, pp. 10-14 (London 1870).[4]

The Star Chamber was abolished in 1641, but Parliament and the Common Law Courts became even more oppressive in stifling free political discussion.[5] II Stephen, *A History of the Criminal Law of England*, pp. 300-01 (1883). "Treason" was redefined to include such things as merely imagining the death of the King or Queen (25 Edw. III, c. 2) and the smothering prior restraints of royal licensing and censorship of the press were imposed and strictly enforced; only the most innocuous or flattering words about the monarchy could legally appear in print. See Plucknett, *Taswell-Langmead's English Constitutional History*, pp. 661-63 (11th Ed. 1960).

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[4] A typical and oft-cited example of a Star Chamber prosecution for seditious libel is the *Trial of Wm. Prynn*, 3 Howell's State Trials 561 (1632). The defendant had written a book criticizing public plays, dances, festivals and other amusements; the book contained one sentence to the effect that loose women frequently took part in plays. Because the Queen had recently taken part in a pastoral play, Prynn was "tried" and convicted for seditious libel; he was sentenced to life imprisonment, fined ten thousand pounds, and in addition, was branded on the forehead, his nose was slit and his ears were cut off. His book was publicly burned.

[5] Unlike the Star Chamber, the Common Law Courts were empowered to impose the death penalty and in cases of seditious libel or treason, death was frequently inflicted by drawing and quartering or beheading. See *Rex* v. *Twyn*, 6 Howell's State Trials 514 (1664). See also Thayer, *Legal Control of the Press*, pp. 10-11 (3rd Ed. 1956).

The English, as could be expected, imported into colonial America their oppressive techniques of stifling all political debate and criticism. The first newspaper to be printed in the colonies, *Publick Occurrences Both Forreign and Domestick* (Boston, September 25, 1690), was suppressed and outlawed after its maiden edition had appeared. See Lee, *The Daily Newspaper in America*, p. 15 (1937). Moreover, the well-known prosecutions of Peter Zenger, Thomas Maule and Roger Williams were all predicated on the English law of seditious libel. See Levy, *Legacy of Suppression*, pp. 32-34 (1960); Thayer, *Legal Control of the Press*, pp. 18-22 (3rd Ed. 1956). There was in the main no right to print anything critical or controversial about the Crown or the colonial regimes.

After the break with England and the ratification of the Constitution, the First Amendment was adopted in an effort to guarantee freedom of speech and press once and for all. However, and most regrettably, the First Amendment did not signal the end of suppression and attempted suppression of free political debate and criticism in the United States.

B. Suppression After the First Amendment.

Within a scant seven years after the adoption of the First Amendment, Congress incredibly passed the Sedition Act of 1798, directly incorporating into our law the English concept of seditious libel. See Hudon, *Freedom of Speech and Press in America*, pp. 44-52 (1963). Enforcement was brief and half-hearted in apparent recognition of the Act's direct clash with the First Amendment, and the crime of seditious libel was finally disavowed and

abandoned in this country.(*) See *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 273-76 (1964): Chafee, *Free Speech in the United States*, pp. 506-07 (1941).

However, those who wished to suppress and censor the press began a search for new and more subtle techniques to achieve their goal—a search that has continued to this day. The device most often attempted has been the civil libel suit, with its lack of criminal law safeguards and unlimited general and punitive damages. See, *e.g.*, *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Associated Press* v. *Walker*, 388 U.S. 130 (1967); *City of Chicago* v. *Tribune Co.*, 307 Ill. 595, 139 N.E. 86 (1923); *Sweeney* v. *Patterson*, 128 F.2d 457, *cert. denied*, 317 U.S. 678 (1942).

Other forms of attempted suppression have included criminal libel prosecutions (*Garrison* v. *Louisiana*, 379 U.S. 64 (1964)), civil injunctions (*Near* v. *Minnesota*, 283 U.S. 697 (1930)), taxation of revenue based on circulation (*Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936)), indirect contempt of court, (*Pennekamp* v. *Florida*, 328 U.S. 331 (1946)), and forcing the publication of advertising that is offensive to a newspaper's advertising standards or policy (*Chicago Joint Board, Amal. Clothing*

(*) President Jefferson pardoned all persons who had been convicted and sentenced under the Sedition Act, stating "I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image." Letter to Mrs. Adams, July 22, 1804, 4 Jefferson's Works (Washington ed.), pp. 555, 556. (Quoted in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 at 276 (1964).

Workers v. *Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971)).

C. The Suppression Involved in the Instant Case.

From the days of the Star Chamber to the present, those who have sought to restrain or censor political news and criticism have invariably professed some lofty or pious motive for doing so. As Justice Stewart observed last Term, "There is never a paucity of arguments in favor of limiting the freedom of the press." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 at 144 (1973) (concurring opinion). This Court, however, has been acutely sensitive to all efforts to suppress or censor the press and has not been deceived by noble motives or clever disguises. Whether the restraint be cloaked under an alleged need to protect reputation (as in *Sullivan, supra*) or to preserve the judicial process (as in *Pennekemp, supra*), the Court has recognized the inherent suppression involved and condemned it.

The Florida "right of reply" statute presents still another disguised and insidious attempt at suppression and restraint of the press. In keeping with past censorial traditions, the statute bears a virtuous title and is defended with a pious declaration of worthy motives and purpose; the Florida Supreme Court has stated that the statute will promote "fair elections" and will actually "encourage rather than impede the wide open and robust dissemination of ideas and counterthought." The argument is sheer sophistry. We submit that no one who has been exposed to American newspaper coverage of a heated election campaign could seriously make such a statement.

In most if not all political campaigns, it would be practically impossible to publish any reports or comments concerning the merits of competing candidates without running directly into the teeth of the "right of reply" statute. Simply reporting as news a statement or speech of one candidate "assailing" or "attacking" (*i.e.*, criticizing) his opponent, would activate the statute and require giving the speaker's opponent free and equal space in the newspaper for "reply." If the reply makes a counterattack that in turn requires a reply, the resulting round-robin could prove endless. Moreover, the statute's application to the editorial page could result in the "right of reply" cycle being triggered by an editorial comment, or even by merely endorsing one candidate over another, as many newspapers do in every election; an endorsement in itself is a weighty and implicit attack against the candidate not endorsed. See *Mills* v. *Alabama*, 384 U.S. 214, 218-20 (1966).

In sum, little imagination is required to see that if newspapers continued their customary news and editorial coverage of election campaigns (particularly in presidential election years when scores of national, state and local candidates are on the ballot), newspapers would be compelled to add endless columns to accommodate the Florida "right of reply" statute, or in the alternative print nothing about political campaigns. Any responsible editor or publisher—faced with the Hobson's choice of seeing much of his newspaper dictated by politicians and government officials or of incurring the criminal penalties of the "right of reply" statute (up to one year in jail and a fine of $1,000)—would clearly opt in favor of printing little or nothing about political campaigns.

It may be argued that the statute's impact would not be as drastic as we envision, *i.e.*, that political campaigns would still be covered. But regardless of how severe the statute may prove in practice, we think it beyond argument that some inhibition must result. The amount or degree would depend on the particular campaign being covered, the policy of individual newspapers, and a myriad of other factors. But the extent of the suppression need not be debated. This Court has declared that our national commitment under the First Amendment is to encourage, not inhibit, comment and criticism, especially in the political arena. *New York Times Co.* v. *Sullivan*, 376 U.S. 254 at 270 (1964). Thus, once the statute is viewed, as we believe it must be, as an inhibitor of robust debate to any degree, it must be stricken for violation of the First Amendment.

CONCLUSION.

We respectfully submit that the Court should note jurisdiction of this appeal, and summarily reverse the judgment of the Florida Supreme Court forthwith.

Repectfully submitted,

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FILE COPY

In the

Supreme Court

of the

United States

OCTOBER TERM, 1975

NO. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of
KNIGHT NEWSPAPERS, INC.,

Appellant,

vs.

PAT L. TORNILLO, JR.,

Appellee.

On Appeal from the Supreme Court of Florida

APPELLANT'S BRIEF IN REPLY TO APPELLEE'S RESPONSE AND MOTION TO AFFIRM THE JUDGMENT BELOW, OR IN THE ALTERNATIVE, TO DISMISS THE APPEAL

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Hart & Wechsler, *The Federal Courts and the Federal System* (2d ed. 1973)	6
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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of
KNIGHT NEWSPAPERS, INC.,
Appellant,

vs.

PAT L. TORNILLO, JR.,
Appellee.

On Appeal from the Supreme Court of Florida

APPELLANT'S BRIEF IN REPLY TO APPELLEE'S RESPONSE AND MOTION TO AFFIRM THE JUDGMENT BELOW, OR IN THE ALTERNATIVE, TO DISMISS THE APPEAL

In response to the Jurisdictional Statement, Appellee ("Tornillo") concedes that the constitutional issues presented by this case are substantial and merit full review by this Court.[1]

However, Tornillo raises a threshold question concerning the "finality" of the decision of the Florida State Supreme Court under 28 U.S.C. §1257(2), because in upholding the constitutionality of Section 104.38, Florida Statutes, the Florida Supreme Court reversed the trial court's decision dismissing Appellee's complaint, and remanded the matter for "further proceedings" consistent with its opinion. Tornillo contends that unless Appellant *("The Miami Herald")* waives all non-constitutional defenses to the complaint, the issues presented by this case are not ripe for determination by this Court.

Tornillo's questioning of the "finality" of the judgment below is predicated upon a misinterpretation and misapplication of the relevant standards. As indicated in the Jurisdictional Statement, the Florida Supreme Court has conclusively decided the controlling constitutional issues presented by this case, and its decision is therefore properly reviewable by this Court under 28 U.S.C. 1257(2) without waiver by *The Miami Herald* of any non-constitutional defenses it may have concerning the application of the statute to the facts of this case.

---

[1]Appellee's Response to Appellant's Jurisdictional Statement and Motion to Affirm the Judgment Below or, In the Alternative, to Dismiss the Appeal at page 7.

A. THE TEST OF FINALITY UNDER SECTION 1257(2) IS MET WITHOUT WAIVER OF NON-CONSTITUTIONAL DEFENSES WHERE THE CONTROLLING CONSTITUTIONAL ISSUES HAVE BEEN CONCLUSIVELY DECIDED BELOW.

In *Mills v. Alabama*, 384 U.S. 214 (1966), this Court reviewed and reversed a decision of the Alabama Supreme Court which upheld the constitutionality of an Alabama statute making it a crime for a newspaper to print political editorials on election day. The trial court had dismissed a complaint against a newspaper editor charging a violation of the statute, holding that the statute violated the freedom of speech and press guaranteed by the Alabama and United States Constitutions. The Alabama Supreme Court reversed, finding that the state statute did not violate the First Amendment, and remanded the case "for further proceedings not inconsistent with its opinion . . ." *Id.* at 217. On appeal to this Court, the State of Alabama argued that the appeal should be dismissed because the state Supreme Court's decision was not a "final judgment." This Court held, nevertheless, that the decision was final even though the judgment of the highest state court "did not literally end the case." *Id.* A trial would be required to determine whether the editor had written and published the editorial. However, the editor conceded these facts, and this Court held that to require the trial, a subsequent appeal to the Alabama Supreme Court, and a second appeal to this Court would involve a "roundabout process" involving "inexcusable delay." *Id.*

The finding of "finality" in *Mills* was concededly simplified because the newspaper editor professed to have no defenses except the unconstitutionality of the Alabama statute. However, a waiver of *all* defenses was not an ingredient of the finding of "finality" in *Mills*. As Mr. Justice Douglas stated in his concurring opinion,

> "Indeed, even had appellant been unwilling to concede that he has no defense—apart from the constitutional question—to the charges against him, we would be warranted in reviewing this case. That result follows a fortiori from our holdings that where First Amendment rights are jeopardized by a state prosecution which, by its very nature, threatens to deter others from exercising their First Amendment rights, a federal court will take the extraordinary step of enjoining the state prosecution. Dombrowski v. Pfister, 380 U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116; Cameron v. Johnson, 381 U.S. 741, 14 L.Ed.2d 715, 85 S.Ct. 1751." *Id.* at 221.

This Court has held repeatedly that the necessary "finality" to review state court decisions is to be tested not by technical refinements, but by practical, pragmatic considerations. *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962). Among such considerations are the substantiality of the federal questions involved, whether the delays of further litigation would seriously affect substantive rights, and whether the controlling federal questions are sufficiently severable from state law issues which remain for decision. *E.g., Hudson Distributors, Inc. v. Eli Lilly & Co.*, 377 U.S. 386 (1964); *Local No. 438 Construc-*

tion & General Laborers' Union, AFL-CIO v. Curry, 371 U.S. 542 (1963); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963); *Rosenblatt v. American Cyanamid Co.*, 86 S. Ct. 1 (1965).

In *Hudson Distributors, Inc. v. Eli Lilly & Co., supra*, the appellant before this Court sought to have the Ohio fair trade act declared unconstitutional. Appellee had cross-petitioned for enforcement of the fair trade act, and appellant answered the cross-petition on the merits. Since the trial court held the fair trade act unconstitutional, the merits of the cross-petition were not reached. On appeal to the Supreme Court of Ohio, that Court upheld the constitutionality of the statute and remanded the case for further proceedings with respect to the issues of fact and law raised in the cross-petition. There were thus matters to be determined under state law in the state court. Appellant did not waive any non-constitutional defenses he might have. Indeed, by his answer to the cross-petition, he fully intended to reserve and contest those purely state law issues. Nonetheless, this Court had no difficulty in concluding that the only issue presented to it for determination—*i.e.*, the validity on its face of the fair trade act—was "final" within the meaning of Section 1257.

> "The fact that separate and unresolved issues are pending in the Ohio courts and subject to 'further proceedings' therein . . . does not render the judgment of the Ohio Supreme Court on the issue here considered and decided non-final or unappealable. . . ." *Id.* at 389, fn. 4.

The decision in *Hudson Distributors* thus makes it clear that a waiver of non-constitutional defenses is by no

means an essential ingredient of "finality" in cases coming before this Court. The rule followed in *Hudson Distributors* and *Mills*—that requisite finality exists where the constitutional question has been conclusively determined and where the remaining non-constitutional issues are unrelated to the issue before this Court—is firmly grounded in the policy underlying Section 1257(2). The test of finality is intended to facilitate "the smooth working of our federal system," *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945), and to assure that all of the factual and legal questions essential to a definitive determination by this Court have been decided, while retaining flexibility to protect important federal substantive rights and achieve procedural efficiency. See *Brown Shoe Co. v. United States, supra* at 306; Hart & Wechsler, *The Federal Courts and The Federal System*, 628-29 (2nd ed. 1973); Stern & Gressman, *Supreme Court Practice*, 100 (4th ed. 1969).

Such policies are illustrated by *Mercantile Nat'l Bank v. Langdeau, supra*, where it was held that this Court could review a pre-trial decision of the Texas Supreme Court which determined that venue of a suit against a national bank lay in the state court, despite a federal statute providing venue for such actions only in federal court. The state court decision was reversed, avoiding an unnecessary trial. Similarly, in the *Curry* case, *supra*, this Court reviewed a decision of the Georgia Supreme Court which had upheld the issuance of a temporary injunction against union picketing. Accepting jurisdiction of the case, this Court held that the Georgia court had exceeded its jurisdiction because the labor question was controlled by federal statutes preempting state law.

Other instances of review of controlling federal questions involved in state court decisions where non-federal issues remained outstanding include *Brady v. Maryland*, 373 U.S. 83 (1963) and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). In *Brady*, the state court had affirmed a criminal conviction, but remanded the case for a new trial on the issue of sentencing. This Court took jurisdiction and reversed the conviction on constitutional grounds. In *Cohen*, this Court reviewed a pre-trial decision which refused to apply a state statute requiring security bonds in a stockholder's derivative suit brought as a derivative action in federal court, although it was claimed that refusal to apply the statute was unconstitutional.

The controlling standard emerging from these cases is that where a case involves unresolved non-constitutional issues which are separate from and unrelated to the constitutional questions otherwise ripe for review, deferral of action by this Court is not required by Section 1257. In such cases, since the state court has exhausted its power with respect to the federal questions, action by this Court does not interfere with the harmonious working of the federal system, and the possibility of determination of the unrelated non-constitutional questions in the further state proceedings will not contribute to or facilitate this Court's decision on the federal constitutional issue presented. For these reasons, the rule quite properly is that "the judgment of the highest state court concluding all constitutional questions is final, despite the fact that another court may pass upon state law issues." Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, Section 32 (2d ed. Wolfson & Kurland 1951).

B. THE CONTROLLING CONSTITUTIONAL QUESTION IN THIS CASE HAS BEEN CONCLUSIVELY DETERMINED BY THE FLORIDA SUPREME COURT AND IS RIPE FOR IMMEDIATE REVIEW.

On the basis of the foregoing principles, this case is plainly "final" for purposes of Section 1257(2). The only issues presented for determination by this Court involve the constitutionality of Section 104.38, Florida Statutes. That foundation question upon which Tornillo's whole claim rests has been fully litigated and definitively determined by the Supreme Court of Florida, first on the original appeal and subsequently on *Miami Herald's* Petition for Reconsideration.[1] *The Miami Herald* concedes that if the statute is held to be constitutional on its face by this Court, it will be constitutional as applied to the particular facts presented here.

The Florida Supreme Court has clearly decided the controlling constitutional issues in this case in holding that §104.38 does not violate the First and Fourteenth Amendments. This decision overruled two lower court opinions which had struck down the statute and was also contrary to the opinion expressed by the Attorney General of Florida. Following a Petition for Rehearing filed by *The Miami Herald*, the Florida Supreme Court adhered to its initial decision in a second extensive opinion. There can be no doubt that the constitutionality of the statute has been conclusively determined in the State of Florida. As in *Mills*, the state Supreme Court has "render[ed] a judgment binding on the trial court. . . ." *Supra* at 217. The control-

[1]Tornillo stated to the trial court that "if the court found the statute upon which this suit is based unconstitutional he did not desire to take further proceedings in this court and requested that his suit be dismissed with prejudice." Jurisdictional Statement, App. 34.

ling question of the constitutionality of the statute is now ripe for immediate review by this Court.

Any remaining issues in this case are of a non-constitutional local character, based upon facts not seriously in dispute, and are wholly separate and apart from the constitutional issues which are now presented for consideration by this Court. If this Court finds the statute to be unconstitutional on its face, the litigation will be determined once and for all. If, on the other hand, this Court upholds the constitutionality of the statute, the issues to be determined in the further proceedings would be of a purely local nature, and the case would not again be brought before this Court.[1] Completion of the "further proceedings" ordered by the Florida Supreme Court prior to this Court's consideration of the serious First Amendment questions raised by this case would be "a completely unnecessary waste of time and energy," *Mills, supra* at 217, because the only issue which would then be presented to this Court after such proceedings is the very issue now before it—the constitutionality on its face of Section 104.38, Florida Statutes.

"Further proceedings" would only waste time and create inexcusable delay. The burden and expense of additional litigation prior to resolution by this Court of the constitutionality of the Florida statute would have a chilling effect upon exercise of First Amendment rights.

> "The very possibility of having to engage in litigation, an expensive and protracted process, is

[1]The only remaining issues which can arise are whether Tornillo is entitled to relief under the terms of the statute, and if so, a determination of his damages, since Tornillo's prayer for an injunction and retraction prior to the election of November, 1972, has been mooted by the passage of time.

threat enough to cause discussion and debate to 'steer far wider of the unlawful zone' thereby keeping protected discussion from public cognizance. *Speiser v. Randall*, 357 U.S. at 526." *Rosenbloom v. Metromedia* 403 U.S. 29, 52-53 (1971).

As the Court of Appeals for the District of Columbia held in *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C.Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967):

> "In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. One of the purposes of the *Times* principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. *The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself*, especially to advocates of unpopular cases. . . . Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is 'hardly less virulent for being privately administered.'" (Emphasis added.)

The decision below urgently requires definitive determination by this Court on the present appeal. The holding of the decision below is broad, finding not only that the statute is consistent with the First Amendment, but that a right of reply statute affirmatively promotes the objectives of the First Amendment. That decision is a radical departure from traditional First Amendment concepts, and conflicts directly with prior decisions of this Court. If this Court does not hear the case now, during the time required for the "further proceedings" in the lower Florida courts, a subsequent appeal to the Florida Supreme Court, and an eventual second effort to obtain review in this Court, the Florida Supreme Court's decision will unquestionably have a substantial adverse effect upon the press in Florida.[1] This is an election year. Criminal prosecutions under the statute may be expected, as well as private actions based upon the statute, which have been sanctioned by the Supreme Court of Florida. Until this Court reviews the constitutionality of the statute, the resulting uncertainty will be severely detrimental to political reporting and comment by the press in Florida.[2]

---

[1]The complaint was filed in this case on October 2, 1972, and over one year elapsed before the final decision of the Supreme Court of Florida on October 10, 1973. *Cf. Mills v. Alabama, supra* at 218 fn. 4, where it was noted that that case had taken about three and one-half years to reach the Supreme Court, and was likely to take a similar time to eventually reach the Court if the appeal was dismissed for lack of finality.

[2]The uncertainty which will ensue if this Court does not hear this appeal will also extend far beyond Florida, since "reply" statutes may be upheld in some states but not in others. While the Florida Supreme Court may consider a reply statute in furtherance of the objectives of the First Amendment, other state supreme courts — notably that of Massachusetts — have effectively held such legislative efforts unconstitutional. *Opinion of the Justices,* 298 N.E.2d 829 (Mass. 1973).

C. CONCLUSION.

For these reasons, *The Miami Herald* respectfully submits that the decision of the Florida Supreme Court upholding the constitutionality of Section 104.38, Florida Statutes, is "final" within the meaning of Section 1257(2).

The question of the constitutionality of the Florida statute presents this Court with sensitive and urgent First Amendment issues concerning access to the press which should be promptly resolved lest uncertainty as to the constitutional status of the statute creates as pernicious an effect as the statute itself. For the reasons set forth in the Jurisdictional Statement and the Briefs of the Amici Curiae, this Court should accept jurisdiction of this case and reverse the decision below.

Respectfully submitted,

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I HEREBY CERTIFY that three copies of the foregoing Appellant's Brief in Reply to Appellee's Response and Motion to Affirm the Judgment Below, or in the Alternative, to Dismiss the Appeal have been served by personal delivery this 7th day of January, 1974 upon Mr. Tobias Simon, Attorney for Appellee, 1492 South Miami Avenue, Miami, Florida 33130, and by mail upon each of the following attorneys for *Amici Curiae:*

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Supreme Court, U. S.
FILED
JAN 21 1974
MICHAEL RODAK, JR., CLERK

In The Supreme Court of the United States

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THE MIAMI HERALD PUBLISHING COMPANY, etc.,

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On Appeal from the Supreme Court of Florida

AMICUS CURIAE BRIEF FOR FLORIDA PUBLISHING COMPANY

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AMICUS CURIAE BRIEF FOR FLORIDA PUBLISHING COMPANY

INTEREST OF AMICUS CURIAE

This brief is filed by counsel for Florida Publishing Company, as Amicus Curiae, pursuant to Supreme Court Rule 42. Written consents of Appellant and Appellee therefor have been filed with the Clerk.

The Florida Publishing Company publishes the daily newspapers in Jacksonville and St. Augustine, Florida – The Florida Times-Union, Jacksonville Journal, and The St. Augustine Record, as well as weekly and semi-weekly newspapers elsewhere in North Florida. The Publishing Company has, therefore, a direct interest in the validity vel non of the so-called Florida Right To Reply Statute – F.S. 104.38. It filed an amicus curiae brief in the Supreme Court of Florida asserting the unconstitutionality of that vague and infirm statute.

It is difficult, if not impossible, for the press to function properly in the heat of a political campaign with the sanctions of that statute hanging over it. Accordingly, the Publishing Company files this brief setting up its position. Just as the lower courts in Volusia and Dade Counties, and the Florida Attorney General, found the statute unconstitutional, so we think this Court should hold.

STATEMENT OF THE CASE

Amicus Curiae adopts Appellant's Statement of the Case.

QUESTIONS PRESENTED FOR REVIEW

A. The Florida Statute (F.S. 104.38) which requires the press to publish a reply as a condition to publishing matter critical of political candidates violates the First Amendment.

B. The Florida Statute is unconstitutionally vague and ambiguous.

ARGUMENT

A. Violation of First Amendment.

The statute here (F.S. 104.38), in vague and ambiguous terms, seeks to require a newspaper (if it has published an article objectionable to a candidate for office) to *"immediately* publish free of cost *any* reply he (the candidate) may make thereto." A criminal penalty is imposed for violation.

There has been one Florida First Amendment newspaper case before this Court since *New York Times*, i.e., *Ocala Star-Banner v. Damron* (1971) 401 U.S. 295. And, just as in *Ocala Star Banner*, the decision of the Florida Appellate Court is in violation of the First Amendment guarantees.

There can be no freedom of speech or of the press if the Legislature can decree just what the press shall or shall not publish. The issue here is just that simple.

If the press has hanging over it the threat that every time it publishes anything about a political candidate, it must, in turn, regardless of the truth, merits or demerits of the candidate's position, publish immediately "any reply" the candidate desires, that makes a mockery of freedom of the press.

News Room Argument

As we stated (in news room language) in our amicus curiae brief in the Supreme Court of Florida:

"(1) Individuals or groups seeking to use the 'equal space' requirements of this ruling can create a form of prior restraint by their mere eligibility to use such powers.

"(2) Persons responding to alleged 'assaults' stemming from political campaign pronouncements could cause newspapers

to print material that could be inaccurate at best and libelous at worst due to the vagueness permitted by this statute in replying to such initial stories.

"(3) Nowhere in the *Tornillo* ruling is there provision for requiring accuracy in such replies or for filing such replies in such time and manner as to give the newspaper the opportunity to verify the contents of such reply.

"(4) If this ruling's 'logic' is carried to its ultimate conclusion, the risk as well as the effort involved in handling such replies could cause newspapers to abandon any efforts to cover comprehensively and intelligently any political campaigns. If one primary candidate with four opponents made a statement attacking the others, a newspaper reporting this statement could find itself with four replies, all of which by this ruling would have to be presented using the same size type and the same space. This could create a situation in which the newspaper would find it impossible to follow the law, thus opening itself to further action.

"(5) Should press coverage of election campaigns, which is part and parcel of our history and our heritage, be thus restricted, the damage done to freedom of the press would be exceeded only by the damage done to the equally historic right of the public to know of the workings of its chosen form of government.

"(6) Should this occur, it would be the first step in regulation of the press in contravention of the First Amendment of the Constitution of the United States. With election campaign coverage thus regulated, it would be only a matter of time until all content of newspapers was similarly regulated.

"(7) Under the Florida Supreme Court *Tornillo* opinion, page 11, the obligation and burden to determine, at one's

peril subject to possible jail sentence, whether the reply is 'wholly responsive' to the charge, and whether such reply is 'neither libelous nor slanderous of the publication nor any one else, nor vulgar nor profane' is unconstitutionally vague and general, and, for practical purposes, not possible to meet. A full factual investigation and legal research and opinion would be required in each case.

"(8) It is essential for the people to know what goes on, particularly in the political field. But if every time a news story is published on a political matter the newspaper has to worry about a law suit or a criminal charge, much news will not be published and the public will be deprived of its right to know."

Florida Statute Invalid

The New York Times and Washington Post may freely publish the stolen Pentagon documents (see dissent of Chief Justice Burger in *New York Times v. United States* (1971) 403 U.S. 713, at 748-752). Yet Florida newspapers are *compelled* to publish immediately any reply an irritated *candidate*[1] submits, under the ruling here.

Mr. Justice Boyd, in his dissent below, ably states what the Florida Supreme Court should have held. We quote:

> "The statute is so vague on its face as to raise doubts in the minds of those reading it as to the exact underlying legislative intent.
>
> "There are no standards as to when a publisher must carry a reply. * * * *

Note 1: The statute applies only to candidates. Once the candidate is elected, the statute does not apply! It may apply, however, to an officer running for re-election.

* * * * * * *

"The First Amendment to the Constitution of the United States provides that, 'Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .' Article I, Section 4 of the Constitution of the State of Florida similarly provides: 'No law shall be passed to restrain or abridge the liberty of speech or of the press.' Since these constitutional provisions prohibit the government from limiting the right of the publishing press to publish news and comment editorially, it would be equally unconstitutional for the government to compel a publisher to print a statement of any person, or persons, against that publisher's will.

"The majority opinion correctly observes that freedom of speech and freedom of the press carry the duty to speak the truth. And, of course, the constitutional rights of freedom of speech and freedom of the press must be exercised with appropriate regard to the provisions of our libel and obscenity statutes. As in all other areas of public and private service, some errors will, from time to time, surely occur. Yet, recognizing that the survival of a free press is contingent upon the press fulfilling its duty to the general public, the overwhelming majority of those in the publishing press comply with the highest of ethical standards.

"We are taught in the Bible that, 'the truth will make you free.' John 8:32.

"Free people can make proper decisions for their own self-government only when they are adequately informed by a free press. To the extent that government limits or adds to that which a publisher must

distribute, freedom of speech and freedom of the press are thereby diminished.

"Almost everyone whose name has been carried frequently in the news media has been offended, at one time or another, by stories or comments with which he disagrees. This is part of the price one pays for success and notoriety. If there exists a problem in this state of affairs, the muzzling of a free press is not the solution to such problem."

Florida Retraction Statute

The Supreme Court of Florida attempts to justify its holding in *Tornillo* by reference to the Florida Retraction Statute – F.S. 770.02. Yet this Court has flatly held that the principles of the First Amendment are not affected by retraction or failure to retract. In *New York Times v. Sullivan* (1964) 376 U.S. 254, at 286, this Court said:

"The Times' failure to retract upon Respondent's demand, although it later retracted upon the demand of Governor Patterson, is likewise not adequate evidence of malice for constitutional purposes."

This ruling has been followed in *New York Times v .Connor* (CA-5, 1966) 365 F.2d. 567, 577, and *United Medical v. Columbia Broadcasting* (CA-9, 1968) 404 F.2d. 706, 713.

Moreover, F.S. 104.38 attempts to *dictate* what a newspaper *must* print – completely different from a retraction statute such as F.S. 770.02.

B. Vague and Ambiguous.

A mere reading of F.S. 104.38, as adequately argued elsewhere, demonstrates the complete invalidity of the statute because of its vagueness and ambiguity. We respectfully refer to the dissenting opinion below, and to the Appellant's brief.

The Supreme Court of Florida may not cure all this lack of standards by a complete *rewrite* of the statute. That is a legislative function – not a judicial one. This is no place for such "judicial activism."

CONCLUSION

The 1913 Florida Right to Reply Statute was "dead" for 60 years until it was re-activated by the Florida Supreme Court in 1973. It should now be put to permanent rest as unconstitutional and void.

Respectfully submitted,

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January, 1974.

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FREE PRESS PUB. CO., INC., TAMPA, FLORIDA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Case No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY, etc.,

Appellant,

vs.

PAT L. TORNILLO, JR.,

Appellee.

On Appeal from the Supreme Court of Florida

AMICUS CURIAE BRIEF FOR TIMES PUBLISHING COMPANY

INTEREST OF AMICUS CURIAE

Times Publishing Company is a Florida corporation which publishes two newspapers serving the West Coast of Florida, the St. Petersburg Times, a morning daily and Sunday newspaper, and the St. Petersburg Independent, an afternoon newspaper published daily except Sunday. Following commencement of the instant litigation against the Miami Herald, the Times Publishing Company had an action commenced against it by an unsuccessful political candidate who claims that the Times Publishing Company violated Section 104.38 Florida Statutes, 1971 (hereinafter referred to as F.S. 104.38), when it refused to publish his reply to an editorial which criticized the candidate's conduct of his campaign.

The primary interest of amicus curiae, notwithstanding its own litigation, is preservation of newspapers in their historic role as commentators upon the political scene independent of government control.

STATEMENT OF THE CASE

Amicus Curiae adopts Appellant's Statement of the case.

QUESTIONS PRESENTED FOR REVIEW

I. F.S. 104.38 VIOLATES THE GUARANTEE OF FREEDOM OF THE PRESS AS PROVIDED IN THE FIRST AMENDMENT.

II. F.S. 104.38 MAKES DISTINCTIONS AMONG PERSONS ADVERSELY AFFECTED, AMONG PERSONS BENEFITED, AND IN THE CONTENT OF PUBLISHED MATTER, EACH OF WHICH ARE IMPERMISSIBLE UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

III. THE FLORIDA REPLY LAW DEPRIVES NEWSPAPER PUBLISHERS OF PROPERTY WITHOUT JUST COMPENSATION OR DUE PROCESS OF LAW.

ARGUMENT

I.

F.S. 104.38 VIOLATES THE GUARANTEE OF FREEDOM OF THE PRESS AS PROVIDED IN THE FIRST AMENDMENT.

Amicus Curiae adopts the argument of Appellant and submits that this should be the determinative issue in this cause.

II.

F.S. 104.38 MAKES DISTINCTIONS AMONG PERSONS ADVERSELY AFFECTED, AMONG PERSONS BENEFITED, AND IN THE CONTENT OF PUBLISHED MATTER, EACH OF WHICH ARE IMPERMISSIBLE UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

A. *Newspapers are selected from all other media to be subject to sanctions.*

F.S.104.38 (the Florida Reply statute) provides as follows:

> "*Newspaper assailing candidate in an election, space for reply.*—If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083."

Sections 775.082 and 775.083 Florida Statutes, 1971, provide penalties of one year imprisonment, a fine of one thousand dollars, or both for first degree misdemeanors.

In the context of First Amendment rights, newspapers have not been subject to classification from other forms of communication. This Court recently had occasion to consider the universal application of the First Amendment. In *Branzburg vs. Hayes,* 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), the court, in denying a newsman's privilege to refuse to appear before grand juries stated:

> "Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets . . . the press even in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' "
>
> *Branzburg vs. Hayes,* 408 U.S. 704, 92 S.Ct. 2668, 33 L.Ed.2d 653.

Does the singling out of newspapers from all of the vehicles of information and opinion meet the equal protection standards imposed by the Fourteenth Amendment where fundamental personal rights are subjected to a special burden? In recent cases involving discriminatory laws affecting First Amendment rights, this court has caused such laws to be "carefully scrutinized" required that they be "narrowly tailored to their legitimate objectives" and required that discriminatory classification abridging fundamental rights be "necessary to promote a compelling governmental interest." *Police Department of City of Chicago vs. Mosley,* 408 U.S. 92, 99, 92 S.Ct. 2286, 2292, 33 L.Ed.2d 212, 218 (1972); *Dunn vs. Blumstein,* 405 U.S. 330, 335, 92 S.Ct. 995, 999, 31 L.Ed.2d 274, 280 (1972); *Williams vs. Rhodes,* 393 U.S. 23, 32, 89 S.Ct. 5, 11, 21 L.Ed.2d 24, 32 (1968).

There is no characteristic of a newspaper germane to the election process that (laying aside pure First Amendment considerations) significantly distinguishes it from speech, a pamphlet, a letter mailing, picketing, a weekly magazine or any other form of communication conveying the same message. For example, a speaker could be compelled to speak a reply, the publisher of a massive letter mailing could be compelled to reproduce and mail out a reply. The classification is patently not tailored to achieve any legitimate state goal. *Kramer vs. Union Free School District,* 395 U.S. 621, 632, 89 S.Ct. 1886, 1892, 23 L.Ed.2d 583, 592 (1969).

The classification of newspapers does not comport with the Fourteenth Amendment mandate of equal protection under the law and F.S. 104.38 is therefore unconstitutional.

B. *The Florida Reply statute imposes a special obligation based upon content of expression.*

The special obligation of publishing a reply is imposed by F.S. 104.38 only upon printed speech in a newspaper which "assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record." If one publishes such statements, whether true or false, fact or opinion, under the Florida Reply statute the publisher acquires the obligation of printing the candidate's reply even though the reply be the antithesis of the publisher's beliefs, political philosophy, and that of the dues payers, subscribers, and advertisers who support the newspaper for their own particular reasons. No similar burden is imposed upon all other expression heretofore protected by the First Amendment.

The Florida Reply statute suffers from the same constitutional defect existent in the City of Chicago ordinance at issue in *Police Department of City of Chicago vs. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed. 2d 212 (1972). Both statutes impose selective burdens on lawful expression determined by content.

> "The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. *The operative distinction is the message on a picket sign.* But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (Emphasis supplied).
>
> *Police Department of City of Chicago vs. Mosley*, 408 U.S. 95, 92 S.Ct. 2290, and 33 L.Ed.2d 216.

The Equal Protection Clause prevented the City of Chicago from discriminating among pickets by reason of the content of their signs and the Equal Protection Clause prevents the State of Florida from subjecting newspaper publishers who comment on the fitness of political candidates from being subjected to the onerous burdens imposed by F.S. 104.38.

C. *The Florida Reply statute discriminates as to the classes of persons to be accorded the extraordinary right of access to privately owned newspapers.*

The issue of whether there is sufficient state involvement in the publication of newspapers for there to be "state action" respecting access has been vigorously

litigated of late. *Cook vs. Advertiser Co., Inc.*, 323 F.Supp. 1212 (D.C. Ala. 1971), aff'd 458 F.2d 1119 (5th Cir. 1972); *Associates and Aldrich Co. vs. Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971); *Chicago Joint Board, Amalgamated Clothing Workers of America, AFL-CIO vs. Chicago Tribune Co., et al.*, 307 F.Supp. 422 (N. Dist. Ill. 1969), aff'd 435 F.2d 470 (7th Cir. 1970), *Cert. Den.* 402 U.S. 973, 91 S.Ct. 1662, 29 L.Ed.2d 138 (1971); *Resident Participation of Denver, Inc. vs. Love*, 322 F.Supp. 1100 (D.C. Colo. 1971).

The uniform result has been recognition of the historic dissociation between the government and the press and a finding there being no "state action" involved in the refusal of a publisher of a private newspaper to print proffered material, whether commercial, editorial, social, or political. If it is determined that the state can compel publication of a reply in a privately owned newspaper the historic dissociation between the state and the newspaper no longer pertains. There is then "state action" with respect to access to the newspaper and with it the concurrent obligation of insuring equal protection to all under the Fourteenth Amendment. Each class to be granted the extraordinary privilege of using the press of another must be selected in a non-discriminatory manner. Where a few are afforded a special privilege, all others similarly situated are correspondingly deprived. Cf. *Police Department of City of Chicago vs. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972); *Dunn vs. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); and *Kramer vs. Union Free School District*, 395 U.S. 699, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969).

The classification involved in the Florida Reply statute fails on two counts: (1) The classification is

not tailored to achieve any legitimate objective and (2) There is and has been no showing of a compelling state interest sufficient to justify the abridgment of First Amendment freedoms and the discriminatory classification.

Under the Florida law, the privilege of compelling another person to surrender the use of their press is limited to political candidates and to no others. Suppose a Florida newspaper accuses John Brown, a political candidate, and Joe Smith, who is not a political candidate, with being purveyors of pornography in the community. Regardless of whether the accusation is true or false, John Brown gets a reply solely by reason of being a political candidate. Joe Smith does not. In *Rosenbloom vs. Metromedia,* 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), this Court laid to rest any distinction, as far as the guarantee of freedom of the press is concerned, among public officials, public figures, and theretofore private persons involved in newsworthy events. Candidate Brown and private citizen Smith are similarly situated. There is no rational basis for the classification unless it can be found in some compelling state interest respecting political candidates.

The Florida Supreme Court identified the state's interest in this classification as:

> "a part of a centuries old legislative task of *maintaining conditions conducive to free and fair elections.* The Legislature in 1913 decided that owners of the printing press had already achieved such political clout that when they engaged in character assailings, the victim's electoral chances were unduly and improperly diminished. To assure fairness in campaigns, the assailed candidate had to be provided an equivalent opportunity to respond; other-

wise not only the candidate would be hurt but also the people would be deprived of both sides of the controversy." (Emphasis supplied by the court).

Tornillo vs. The Miami Herald Publishing Company, 287 So.2d 78, 81 (Fla. 1973).

This is unquestionably a legitimate objective but there is no compelling need to promote this objective by the methods of the Florida Reply Law. In pursuing an important interest, "the State cannot chose means that unnecessarily burden or restrict constitutionally protected activity." *Dunn vs. Blumstein,* 405 U.S. 343, 92 S.Ct. 995, 31 L.Ed.2d 285.

Unlike the broadcast media, newspapers are not "public trustees" of a scarce public resource. Their First Amendment rights are not "abridgable." They cannot be compelled to devote portions of their publication to matters of public interest as a condition to retaining the right to publish. *Columbia Broadcasting System vs. Democratic National Committee,* 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973).

If the compelling state interest underlying F.S. 104.38 is the promotion of fair elections by the means of causing both sides of a political controversy to be published in newspapers the purpose is subject to total frustration by newspapers adopting the simple expedient of making no comment concerning political candidates. Such a course is encouraged by the reply burden and criminal penalties. Being counter-productive, the Florida Reply Law is obviously not necessary to accomplishment of its alleged governmental purpose.

The heavy burden of justification rests upon the state. *Dunn vs. Blumstein,* 405 U.S. 342, 92 S.Ct. 1003, 31 L.Ed.2d 284. There is no record before this court that F.S. 104.38 has made even the minutest contribution to political dialogue in the State of Florida and it follows that there is nothing to demonstrate that the burden imposed by this statute is necessary to promote such dialogue in the future.

The state has wholly failed to justify singling out political candidates from all other persons similarly situated to enjoy the benefit of a state compelled reply to adverse comment concerning them appearing in newspapers.

Each of the three classifications implicit in F.S. 104.38, namely those of persons benefited, persons adversely affected, and of content of published matter, are impermissible distinctions under the First and Fourteenth Amendments. The statute is unconstitutional.

III.

THE FLORIDA REPLY LAW DEPRIVES NEWSPAPER PUBLISHERS OF PROPERTY WITHOUT JUST COMPENSATION OR DUE PROCESS OF LAW.

A. *The First Amendment considerations are preeminent.*

As stated under Point I of this argument the First Amendment considerations in this cause are preeminent and certainly outweigh the property rights jeopardized by this unconstitutional law. The manner and degree of deprivation of the property rights, however, underscore the burden on the First Amendment rights and give substance to the chilling effect upon political comment caused by the Florida Reply Law.

B. *The taking of newspaper space for public purposes without just compensation is unconstitutional.*

A newspaper is the product of the publisher's labor, personal or employed, an investment in newsprint, materials, time and talent. A newspaper and the matter it contains is property, *International News Service vs. Associated Press,* 248 U.S. 215, 39 S.Ct. 68, 63 L.Ed. 211 (1918); *McGill, et al. vs. State,* 209 Ga. 500, 74 S.E.2d 78 (1953). The court may judicially notice that newspaper space is a relatively expensive commodity which is sold in units as small as a single line in a single column.

The Florida Reply Law requires publication of a free reply. Such a taking, assuming the law is truly intended to be for the public benefit, is in violation of the guarantees of just compensation and due process as provided in the Fifth and Fourteenth Amendments.

The Florida Reply Law is an illegal and unreasonable exercise of the police power.

This amicus curiae raised the issue of deprivation of property without due process in the Florida Supreme Court and that court responded that the Reply Law was a valid exercise of the police power. This it assuredly was not. A valid exercise of the police power includes the following characteristics:

1. Appropriate compensation to the owner if the destroyed or taken property has residual value, e.g., not infested, not in the path of fire.

2. A taking or regulation reasonably related to the public health, safety or welfare.

3. The proper official action is involved.

4. Notice and hearing are provided unless immediate danger requires otherwise.

See *Miller vs. Schoene,* 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928); *State Plant Board vs. Smith,* 110 So. 2d 401, 404, (Fla. 1959); Cf. *Bowditch vs. Boston,* 101 U.S. 16, 25 L.Ed. 980 (1880); *Southern R. Co. vs. Virginia,* 200 U.S. 190, 54 S.Ct. 148, 78 L.Ed. 260 (1933).

As stated above, the Florida Reply Law provides no compensation for valuable newspaper space. The relation to public health, safety and welfare is non-existent since the statute inhibits publication of true statements concerning a candidate's fitness and requires publication of any reply he may make, even if replete with false statements about his qualifications and fitness. The power to take over a newspaper publisher's press is vested in a private individual, not a government official. Such a delegation of the police power was declared unreasonable and a denial of due process in *Eubanks vs. City of Richmond,* 226 U.S. 137, 33 S.Ct. 76, 57 L.Ed. 156 (1912). Notwithstanding the absence of any imminent peril, the Florida Reply Law makes no provision for a judicial hearing to determine the applicability of the statute authorizing the taking. Cf. *Miller vs. Schoene, supra; Southern R. Co. vs. Virginia, supra.* The Florida Reply Law, lacking every fundamental requisite of due process, is violative of the Fifth and Fourteenth Amendments and must be found unconstitutional.

CONCLUSION

The Florida Supreme Court has attempted to relegislate a long forgotten political campaign law so as to introduce a substantial element of government control into the political content of newspapers. The Florida statute collides head-on with the First, Fifth and Fourteenth Amendments to the Constitution of the United States. The constitutional defects of the statute are fundamental and cannot be harmonized with established constitutional principles. The judgment of the Supreme Court of the State of Florida should be reversed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief of Amicus Curiae were furnished by U.S. Mail this 22nd day of February, 1974, to Mr. Tobias Simon, Attorney for Appellee, 1492 South Miami Avenue, Miami, Florida 33130, and to Messrs. Daniel P. S. Paul and James W. Beasley, Jr. of Paul and Thomson, 1300 First National Bank Building, Miami, Florida 33131, Attorneys for Appellant, The Miami Herald Publishing Company.

By /s/ William C. Ballard
WILLIAM C. BALLARD

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Supreme Court, U. S.
FILED
FEB 27 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
Appellant,

v.

PAT L. TORNILLO, JR.,
Appellee.

On Appeal from the Supreme Court of Florida

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, AMICUS CURIAE

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MIAMI REVIEW — 371-4853 — 377-3721

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, AMICUS CURIAE

INTEREST OF AMICUS

This Brief is filed (with the parties' consents previously filed in this Court) by the American Civil Liberties Union of Florida pursuant to Rule 42. The American Civil Liberties Union of Florida is a nonpartisan organization with the sole purpose of protecting the Bill of Rights. Amicus is particularly interested in the outcome of this case because the Florida Statute involved, §104.38, and the decision of the Florida Supreme Court holding the statute constitional, deleteriously affect the conduct of elections and freedom of press in the State of Florida.

STATUTE INVOLVED

Florida Statutes §104.38:

> Newspaper assailing candidate in an election; space for reply. — If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicious a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to reply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083.

SUMMARY OF ARGUMENT

The statute involved in this case, by granting a "Right of Reply" or "Right of Access", clearly breaches the freedom of press guarantee of the First Amendment. Such right to access exercised by any individual results in corresponding reduction in the freedom of the print media to print or not as they so desire.

The First Amendment interdiction of governmental interference with this country's free press conclusively and completely bars the entry of the State into the editorial board rooms and journalistic newsrooms of all newspapers. By granting political candidates a right to space in newspapers, the Florida Legislature and Supreme Court effectively curtailed, abridged and eliminated freedom of the press in Florida.

ARGUMENT

I

THE FLORIDA STATUTES §104.38 ABRIDGES FREEDOM OF THE PRESS

A. Introduction

All parties herein concede that this is a case of first impression before this Court and that no such statute has ever been held Constitutional before.

The Florida Supreme Court and Tornillo assert the novel position that the Florida right to reply statute "implements" freedom of the press rather than restraining

it because the statute aids the free flow of information and ideas and thus enhances the public's right to know.[1]

In the first place, no semantic exercise can change the obvious fact that the statute restrains or abridges private newspapers' freedom to print or not to print as they see fit and does not "implement" freedom of the press.

In the second place, the Florida statute does not benefit the public's right to be informed.

In the third place, whether or not the statute "implements" or inhibits the free flow of information is irrelevant to the statute's constitutionality or lack thereof because the Constitutional prohibition against any "law . . . abridging the freedom . . . of the press" does *not* make an exception for laws-abridging-freedom-of-press with the purpose of enhancing the public's right to know.

The very language of the First Amendment demonstrates the framers' determination that a governmentally unfettered right to print or not to print is the best means for assuring the people's right to know, the considered judgment that a constitutional wall separating newspapers and government is the best means for protecting and encouraging the free flow of information. The very language of the First Amendment explicitly rejects a compulsory governmental press, a governmentally-determined "responsible" press, a governmentally-insured "accurate" press or a governmentally-guaranteed "freedom of access to press."

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[1]See e.g. Appellee's Response to Appellant's Jurisdictional Statement . . . (hereinafter called App. Response), pp. 9, 14-15.

The underlying basis for the First Amendment is that truth best emerges in a free marketplace of ideas.[2] Therefore, all Americans — liberal or conservative, reactionary or radical, black or white, rich or poor, majority or minority — must have the right to print or not to print and to read or not to read "the truth" as they see it, free from governmental interference. In other words, the function of newspapers in exposing and evaluating government weaknesses and strengths cannot be accomplished if government itself is to determine "the truth" or require newspapers to print specified matter.

The basis of the First Amendment is the separation of the press and the government. If Tornillo is correct or if Tornillo's position represents sound public policy, then the proper forum for Tornillo is the Congress and the State Legislatures to modify, alter or repeal the First Amendment. If each citizen has a "right-to-know" paramount to the freedom of the press, then the First Amendment should be properly altered by amendment.

The First Amendment, however, prohibits laws allegedly aiding the public's right to know if and when they abridge freedom of the press.[3] Similarly, the First

[2]See e.g. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (dissenting op., Holmes, J.).

[3]See e.g. *Near v. Minnesota*, 283 U.S. 297 (1931) and *New York Times v. United States*, 403 U.S. 713 (1971) (prior restraints); *Bridges v. California*, 314 U.S. 252 (1941), *Pennekamp v. Florida*, 328 U.S. 331 (1946), *Craig v. Harney*, 331 U.S. 367 (1947), and *Mills v. Alabama*, 384 U.S. 214 (1966) (subsequent punishments); *Grosjean v. American Press Company*, 297 U.S. 233 (1936) (discriminatory taxes); *New York Times v. Sullivan*, 376 U.S. 254 (1964), *Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967), and *Rosenbloom v. Metromedia*, 403 U.S. 329 (1971) (inhibiting forms of libel actions).

Amendment in no way imposes or permits any legal duty on the press to inform the public and does not enforce any duty on the public to be informed.

Just as our Constitution presently rejects voting as a citizen's compulsory duty in favor of voting as a citizen's right (subject to personal option to exercise or not), so too it rejects a compulsory "informed" public. In both instances, the implicit premise is that some ultimate democratic goals, such as elections involving all eligible citizens, all of whom are totally informed, cannot be achieved by governmental compulsion.

As suggested previously, the *reductio ad absurdum* of the position taken by the court below and Tornillo would be, in addition to compulsory printing in the name of "access to media," another Florida statute involving compulsory reading in the name of "the free flow of information." Amicus contends that both are equally incompatible with democracy, that neither would further the legitimate interest in fair and honest elections, and, most important, that both reject freedom of the press as guaranteed by the Constitution in favor of a new esoteric and unworkable experiment to be undertaken by judicial interpretation rather than Constitutional Amendment.

B. The Columbia Broadcasting System Case.

In *Columbia Broadcasting System v. Democratic National Committee*, 36 L.Ed. 2d 772 (1973), this Court held that radio and TV broadcast licensees' policy against accepting paid editorial advertising does not violate the First Amendment and/or the Federal Communications Act (Mr. Justices Brennan and Marshall dissenting). Disagreement

among the Justices arose because the existing "hybrid" system of government regulation of private radio and TV due to limited broadcast frequencies raised serious questions concerning "governmental action" under the First Amendment. Such questions are irrelevant in this case because, as the *CBS* opinions explicitly point out, newspapers are not and cannot be so governmentally regulated under our Constitution.

Thus in Part I of the opinion of the Court, six Justices retiterated with approval the *Red Lion* proposition that "it is idle to posit an unabridgeable First Amendment to broadcast comparable to the right of every individual to speak, write, or publish."[4] Similarly, in the dissenting opinion, two Justices also cited the same *Red Lion* language.[5] The one remaining Justice deemed the First Amendment equally applicable to private radio and TV broadcasters as to private newspapers, banning "access" law or any other law that abridges freedom of the press in both instances.[6]

Futhermore, although a majority of this Court permits some government regulation of radio and TV in view of the "inherent physical limitation" involved (i.e., "Broadcast frequencies are a scarce resource"),[7] no mem-

[4]*Columbia Broadcasting System* case, *supra* (hereinafter *CBS*), 36 L.Ed. 2d at 783 (Opinion of the Court, Part I, quoting from *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969).

[5]*CBS*, 36 L.Ed. 2d at 839 (dissenting op., Brennan, J.).

[6]*CBS*, 36 L.Ed. 2d at 809 (separate op., Douglas, J.); See also at 801 (separate op., Stewart, J.).

[7]*CBS*, 36 L.Ed. 2d at 783 (Opinion of the Court, Part I); see also at 790 (Opinion of the Court, Part III), at 797 (Opinion of the Court, Part IV), at 802 (separate opinion, Stewart, J.), at 829 and 838 (dissenting opinion, Brennan, J.), and cf. at 815-816 (separate opinion, Douglas, J.).

ber of this Court would permit similar governmental regulation of private newspapers based on alleged economic limitations (i.e., newspapers' alleged "monopolistic influence" as relied on by the court below in response to Tornillo's plea[8]).

For example, Part I of the Court's opinion stated that "All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated" on account of the scarce natural resource,[9] thus justifying in effect an abridgeable or non-absolute right to broadcast. (Clearly all who possess the money and wish to communicate by printing newspapers *can* do so.).

As set forth by Mr. Chief Justice Burger in Part III, the First Amendment does not allow infringement of newspapers' freedom on the ground that some Americans who want to publish are not rich enough to do so:[10]

> "The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers — and hence advertisers — to assure financial success; and second, the journalistic integrity of its editors and publishers."

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[8] *Tornillo v. The Miami Herald Publishing Company,* So. 2d (July 18, 1973); Jurisdictional Statement, Appendix A, pp. App. 8-9.

[9] *CBS,* 36 L.Ed. 2d at 783 (Opinion of the Court, Part I).

[10] *CBS,* 36 L.Ed. 2d at 792 (Opinion of the Court, Part III).

In analagous fashion, Mr. Justice Douglas' separate opinion states that with respect to daily newspapers "it would be virtually impossible for a competitor to enter the field due to the financial exigencies of this era" but nevertheless takes the position that the First Amendment does not permit " 'some' laws 'abridging' freedom of the press."[11]

Again, Mr. Justice Stewart's concurring opinion specifically rejects the argument that newspapers should be "compelled to open their pages to all comers" or to "dissident voices" or to "responsible" dissident voices, and rejects any such argument even if "there was a single newspaper in a particular community":[12]

> "For that guarantee [of the First Amendment] gives every newspaper the liberty to print what it chooses and reject what it chooses, free from the intrusive editorial thumb of Government."

Lastly, the dissenting opinion of Mr. Justice Brennan, in which Mr. Justice Marshall joined, also proscribed governmental regulation of newspapers despite economic disparity:

> "The decision as to who shall operate newspapers is made in the free market, not by Governmental fiat. The newspaper industry is not extensively regulated and, indeed, in light of the differences between the electronic and printed media, such regulation would violate the First Amendment with respect to newspapers."[13]

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[11] *CBS*, 36 L.Ed. 2d at 816 (separate op., Douglas, J.).

[12] *CBS*, 36 L.Ed. 2d at 808 (separate op., Stewart, J.).

[13] *CBS*, 36 L.Ed. 2d at 829 (dissenting op., Brennan, J.).

Returning now to the facts of the *CBS* case, in Part IV of the Court's *CBS* opinion, five Justices concluded that neither the public interest standard of the Federal Communications Act nor the First Amendment "requires broadcasters to accept editorial advertisements" and consequently rejected the limited right of access requested by the Democratic National Committee;" Regimenting broadcasters is too radical a therapy for the ailments respondents complain of."[14] Most assuredly, Florida's Right to Reply Statute and Tornillo's right-of-access to *newspapers* theory both involve regimenting newspapers to an incredible degree, a degree far greater than that already rejected by this Court for broadcasters.[15]

II

THE "RIGHT-OF-ACCESS" THEORY ABRIDGES THE FIRST AMENDMENT

A. Economic Factors

The main thrust of Tornillo's argument is that the First Amendment coupled with today's economic conditions guarantees or at least does not prohibit a right of access to newspapers by assailed political candidates, and that Florida's Right to Reply Statute is constitutional because our free enterprise system has yielded a giant newspaper

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[14]*CBS*, 36 L.Ed. 2d at 794-797 (Opinion of the Court, Part IV); see also at 807-808 (separate op., Stewart, J.) and quoted material in text accompanying fn. 12 of this Brief as well as at 817-819 (separate op., Douglas, J.: "the laissez faire regime which the First Amendment sanctions" renders the Fairness Doctrine imposed on broadcast licensees improper, leastwise any governmental-compulsory-access-to-newspaper media.

[15]*CBS*, *supra*.

industry and monopolization rendering it all but impossible for the average citizen and minority group to reach the public through print:

> ". . . In this law, the Legislature, in 1913 (!) decided that the owners of the printing presses had (already) achieved such political clout that when they (the publishers) engaged in character assailings, the victims' electoral chances were unduly and improperly diminished . . . For these reasons and *to avoid a hit-run election stratagem, concocted by one candidate and a dominant newspaper*, the Legislature in F.S. 104.38 gave the victim of the press' acerbic pen, a limited opportunity to respond to the same people who read the attack against him.
>
> "There can hardly be anything Communistic about that!!"
>
> (Brief of Appellant Tornillo in the Supreme Court of Florida, pp. "xi" and "xii," original emphasis)

If Tornillo had a tenable position, it would not be necessary to bandy about the term "Communistic." Regardless of Tornillo's views about Communism, it is simply not constitutional to deprive a newspaper publisher of his private property (newspaper space) without just compensation (or indeed any compensation), nor is it constitutional to give some Americans the right to "buy" private newspaper space for free and even if the property owner doesn't want to "sell" it.

Amicus suggests that constitutional remedies for those Americans who desire more access to private newspaper media and cannot afford to reach the audience they wish would include working for economic betterment or reform *within* our Constitutional system.[16]

Assuming arguendo that the goals sought to be achieved by Tornillo are desirable, mere economic size does not a Constitution unmake. There are numerous ways in which candidate Tornillo could have presented his case to the electorate in his district (not all of Dade County) without infringing upon the freedom of the editors and publishers of the *Miami Herald* to speak their minds. Tornillo could have hired halls, spoken to individual voters, distributed leaflets and pamphlets, or strived for change within our constitutional system to enable him to speak his mind to his particular group of voters without tampering with the First Amendment.

The particular defendant presented to this Court involves an inviting target — the extremely popular and widely circulated *Miami Herald*. The Right of access to the smaller newspapers in Dade County (and there are many) or the "newspapers" published by private organizations in Dade County (and there are many) is not of immediate interest to the parties. This Court, however, will be deciding the fate of these smaller newspapers and organizations "newspapers" too.

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[16]Parenthetically, Constitutional remedies for one who desires more access and also advocates some Marxist principles would include trying to persuade a majority of Americans to agree through First Amendment peaceful means of persuasion and legally striving for pertinent Constitutional Amendments; asking any Court to amend our First Amendment is an improper remedy under our Constitutional system.

Although the *Miami Herald*, economically speaking, might be able to survive free space for a right to reply for political candidates, it is highly questionable whether the *Dade Democrat* (the publication of the Dade County Young Democrats) or the *Classroom Teacher* (the newspaper publication of the organization with which Mr. Tornillo is affiliated)[17] would also be able to survive. What will be the effect of the Florida Statute upon the *Coral Gables Times*, the *Greater Miami Journal*, the *North Dade Journal*, the *Liberty City News*, and the many other small newspapers in Dade County, if the Statute is upheld, invoked with increasing frequency, and enforced with merely appropriate effort (leastwise with zealous dedication)?

Equally important, economically speaking, is the strong possibility that one reason for the *Miami Herald's* wide circulation is its exposure and evaluation of "official" records and "candidates" such as Mr. Tornillo, and that one reason for the continued existence of the numerous small papers in Dade County is their appeal to their readers on the basis of their particular viewpoints. In all probability the *Miami Herald's* readership and circulation would diminish if it were forced to give all such persons a right of reply, thereby diluting the *Miami Herald's* editorial spleen; certainly the (Dade County) *Jewish Floridian* would lose a substantial portion of its subscribers if it were compelled to print "replies" of candidates supporting the anti-Israel "Palestine Liberation Front" and the *Miami Times* (published by and for Dade County's black residents) would soon go out of business if it were compelled to print "replies" of candidates advo-

[17]It should be noted that Appellee Tornillo has total access to this newspaper which goes to some 8,000 of the 12,000 teachers in Dade County.

cating segregated public schools, etc.! Requiring newspapers to become community bulletin boards rather than strong and independent voices in the community, however unpopular or unusual, would mean economic death of newspapers as they now exist. (Whether or not there is a ready market for "community bulletin boards" is an economic question whose answer is unknown to Amicus and irrelevant to decision of the case at bar, though it may be of interest to enterprising Americans looking for the proverbial road from rags to riches).

Additionally, just as a relatively poor person is constitutionally entitled to run for public office, but he is not constitutionally entitled to compel a crowd of listeners to gather to hear him in an auditorium . . . and receive bus or cab fare for such listeners from the government, so too such a person should not be constitutionally entitled to gather the same listening or reading audience through the unwilling columns of a daily newspaper . . . and to do so at the publisher's expense. Economic size cannot be a constitutional criterion for access. The bully is as entitled to speak and print freely as the meek, the powerful as entitled as the weak, and vice-versa under our Constitution, without regard to high or low financial status.

B. Effects on the free exchange of information and Opinion

The primary fallacy in Tornillo's argument, however, is not the Florida Statutes' deleterious effect on the newspapers' economic profits but instead the Right to Reply law's destructive effect on the free, "uninhibited, robust and wide-open"[18] discussion of governmental affairs.

[18] *New York Times v. Sullivan, supra,* at 270.

Thus enforcement[19] of the Florida Statute means no newspaper can print any critical evaluation of any candidate for nomination or election without inviting or risking the right to reply under one or more of the law's four subsections.

The only two ways for a newspaper to avoid the Statute (assuming arguendo it is not void for vagueness) would be (1) to print a list of candidates supported with no further comment, no rhyme or reason for the newspaper's support, or (2) to eliminate from the newspaper's columns, editorials, etc. all information and evaluation concerning candidates and their attitudes or actions which might conceivably be deemed to *assail their personal characters* or to *attack their official records*, i.e., to cut all candidate-and-record assessments encompassing any criticism whatsoever. Obviously neither of the above avoidance methods would inure to the benefit of the public's right to know, nor would such self-censorship help secure fair and honest elections.[20]

If, on the other hand, the average Floridian newspaper decided to invite and print all the required reply-material-in-similar-space-and-type, the newspaper would soon lose those readers interested in particular points of view, those readers interested in "the truth" as their chosen newspaper sees it, those readers disinterested in commu-

[19]The case at bar is apparently the second ever having been brought under the Florida Statute, and the first case in which the Statute was held constitutional by any Florida Court. Jurisdictional Statement, p. 6. In view of the nationwide publicity and interest in this case, a decision by this Court upholding the Statute would inevitably result in constant massive recourse to the Statute and assiduous enforcement thereof by the Florida courts.

[20]Cf. *Mills v. Alabama*, *supra*, at 219.

nity billboards advancing all points of view and exercising neutrality rather than editorial judgment. This kind of compliance with the Florida Statute would not increase the free flow of information and opinion nor make elections more fair and honest.

The political campaign is a central feature of a democracy. But this fact does not support Tornillo's view that a Right to Reply is peculiarly compelling; this fact supports Appellant's position because government regulation of newspapers' political commentary, however innocent it may seem to some at first blush, is indeed the prelude to dictatorship through suppression of full and free discussion of political concerns.

No free marketplace of ideas can coexist with compulsory access to private newspaper media, and no election can be fair and honest when the free marketplace of ideas is decreased or destroyed:

> "' . . . any effort to solve the broader problems of a monopoly press by forcing newspapers to cover all "newsworthy" events and print all viewpoints, under the watchful eyes of petty public officials is likely to undermine such independence as the press now shows without achieving any real diversity.' The System of Freedom of Expression. (1970), p. 671"[21]

The decision below is particularly reprehensible to the entire function and meaning of the democratic process. At the heart of the democratic process is the election. At the

[21] *CBS*, 36 L.Ed. 2d at 811 (separate op., Douglas, J., quoting "Thomas I. Emerson, our leading First Amendment scholar").

heart of each election is each person's opinion. At the heart of each person's opinion is the right of every person, every group and every newspaper to express a view on every candidate no matter how outrageous that view may be and subject only to the applicable law of libel.

The editors of the *Miami Herald* are as entitled to express their opinions through their columns without government interference as much as any individual is entitled to express his opinion verbally or in print without government interference. If Tornillo may require the *Miami Herald* to print his replies today, then he can require each individual who speaks against him to speak his replies tomorrow. What Tornillo really seeks is not a "right-of-reply" (which by any constitutional standard is untenable and by any practical standard is unworkable), but a right to stifle and shield government and politicians from legitimate public inquiry and comment.

A subsidiary legal argument relied on by Tornillo merits brief attention.

Tornillo has managed to confuse Florida's Right to Reply candidates' *access* law with some imaginary right-to-reply-to-*libel* legislation not involved in the case at bar and not now before this Court.[22] The Florida Statute in no way requires libel before its prescribed right-to-reply comes into play. Moreover, Tornillo did not sue as a "libel plaintiff" in the instant case, has not sued the *Miami Herald* in any civil libel action grounded on the editorial involved herein, and has not sought a retraction under a separate Florida libel Statute (§770.02), providing for limited libel damages if the losing defendant printed the

[22]See e.g. App. Response, pp. 10 et seq.

winning plaintiff's requested retraction. Whether or not the recent case-law establishing the new "public law of libel" so deplored by Tornillo[23] should be judicially modified is irrelevant in the case at bar. Surely Tornillo's objections to this Court's extensions of the *New York Times* rule limiting libel actions against newspapers cannot support Tornillo's contention that the Florida non-libel access Statute is thereby rendered constitutional even though it abridges freedom of the press.

C. Historical Considerations

Although "no citizen, and certainly no jurist worthy of his position, would or should conclude his judgment on either a constitutional question or a matter of public policy by an antiquarian examination of the original meaning of the freedom of speech-and-press clause," L. Levy, *Freedom of Speech and Press in Early American History; Legacy of Suppression* 4, a short comment on Appellee's argument is indicated.

The argument has been made that the framers of the First Amendment, who intended and required separation of the press and the government, and chose not to provide "freedom of access" to the press by aggrieved citizens or politicians, should be "overruled" because neither Tornillo nor the *Miami Herald* were in existence at the time nor were the economic conditions that spawned them both. Since it is true that (1) the First Amendment was written in the late 18th century for an agrarian rural society, not

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[23]See e.g. Response, p. 12, referring to *New York Times v. Sullivan, supra, Rosenblatt v. Baer*, 383 U.S. 75 (1966), *Curtis Publishing Company v. Butts, supra*, and *Rosenbloom v. Metromedia, supra.*

a highly industrialized urban one, that (2) many small newspapers existed then in even the tiniest towns and cities, and that (3) the small franchise and population size permitted each citizen to make his/her views known from his/her own soapbox, then freedom of access to private newsprint was not and would not have been a real issue before drafters of the First Amendment. So the argument runs.

As a matter of fact, the framers of our Constitution *did* consider the access question before rejecting it in favor of our present First Amendment. To illustrate, Benjamin Franklin, an active participant in Constitutional framing and the pre-eminent printer and newspaper publisher of his day, carefully explained that his paper was his to mold and was not to be shared like "a stagecoach with seats for all."[24]

As another matter of fact, the 5 million or so inhabitants of the 13 colonies in 1774 had less access to information than we 250 million Americans have in 1974. Two hundred years ago telephone, telegraph, radio, television, air mail, railways, and even traversible highways did not exist. Delays of weeks or occasionally months occurred in mail delivery. Dangers from the elements, highwaymen, etc. did not help communication. The non-existence of universal education and the resulting lowered literacy impeded access. The limitations on the electorate to male property owners left a majority of adult Americans forbidden to vote and lessened the motivation of some with respect to learning about public affairs.

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[24] *CBS*, 36 L.Ed. 2d at 811-812, see text accompanying fn. 2 (separate op., Douglas, J.).

Thus, historically comparing the availability of news, opinions and ideas of 1974's American to 1774's American reveals the insignificance of today's alleged decrease in the number of privately owned newspapers and alleged increase in the economic costs of publishing such a paper.

III

ADDITIONAL GROUNDS FOR INVALIDATING STATUTE

A. Void For Vagueness

Florida Statutes §104.38 fails to provide adequate notice to persons of ordinary intelligence as to what conduct is forbidden. The statute mandates a reply "if a newspaper . . . assails the personal character of any candidate . . . " without delineating what constitutes an "assault" or what constitutes "personal character." Is it an assault to say that a man simply is not big enough to fill a particular office? Is personal character attacked by endorsing one candidate over another? Is it an assault on personal character to state that a candidate has been convicted of a crime when in fact he has been convicted of a crime?

The dissenting opinion of Florida Supreme Court Justice Boyd in the case *sub judice* suggested that there are some important questions left unanswered by this statute:

> "Does the law include both news stories and editorial comments? If a story mentions a 'situation,' but does not mention the candidate by name, may he reply? When the publisher knows the

> statements are true must he publish a statement by the candidate which he knows to be false? If the reply of the candidate libels other persons, must the publisher print it and, if so, is the publisher subject to liability for any resulting libel suit? If the candidates reply were to contain obscene language, would the publisher still have to print it — and thereby invite prosecution under obscenity laws?"
>
> *Tornillo v. The Miami Herald Publishing Co.*, — So.2d — (1973), (Jurisd. Statement, App. pp. 22-23A).

Where a state seeks to regulate, the due process clause requires that the statute authorizing such intrusion be cast in language that is clear and unambiguous. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Palmer v. City of Euclid*, 402 U.S. 544 (1971); *Connally v. General Construction Company*, 269 U.S. 385 (1926). This Court has declared:

> "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application, violates the first essential of due process of law." *Id.* at 391.

Clarity and precision serve two critical functions. First, it assures that those who may be affected so seriously have notice of behavior which will subject them to the State's interference. *Connally v. General Construction Co., supra.* Second, the proscription against vagueness

serves to prevent courts and other official authorities from enforcing a statute in a wholly subjective manner. *Giancano v. Pennsylvania*, 382 U.S. 399 (1966); *U.S. v. Cohen Grocery*, 255 U.S. 81 (1921) and *Herndon v. Lowry*, 301 U.S. 242 (1937).

This prohibition of vagueness is based upon notions of due process and fundamental fairness which must attend any state regulation. The concept of vagueness has been used by the Courts in many different ways, two of which are controlling here:

1. A penal statute must give adequate notice of the conduct proscribed. *In Papachristou v. Jacksonville, supra*, this Court struck down a vagrancy ordinance. It held:

> "This ordinance is void-for-vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute,' . . . and because it encourages arbitrary and erratic arrests and convictions." (Citations omitted)

The Court further quoted a much earlier opinion:

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the court to step inside and say who could be rightfully detained and who could be set at large." *United States v. Reese*, 92 U.S. 214, 221 (1876).

2. A penal statute cannot carry with it the threat of erratic and arbitrary arrests and convictions. *Papa-*

christou v. City of Jacksonville, supra; Thornhill v. Alabama, 310 U.S. 88 (1940); *Herndon v. Lowry, supra; United States v. Reese, supra.*

This statute by subjecting one to threats of arbitrary and erratic arrests and convictions, by failing to give adequate notice, and by failing to prescribe specifically what conduct falls within the purview of the statute, sets a net large enough to catch all possible offenders and leaves it to the courts to say who could be rightfully detained and who shall be set at large, and is thus void for vagueness. See *United States v. Reese, supra.*

So amenable are the terms of the statute to subjective interpretation, the statute's application must perforce be capricious. Indeed, no legislative prescription really governs the enforcement of this penal statute. The statute is wholly subjective and unlimited in scope, thereby depriving Florida citizens of their most fundamental, constitutionally protected rights, to wit: those embodied by the First Amendment.

B. **Overbreadth**

The statute in question also violates the prohibition against overbreadth by proscribing legitimate First Amendment rights.

Florida Statutes §104.38 provides that "if a newspaper in its columns assails the personal character of any candidate . . ." the newspaper, unless it prints a reply, shall be guilty of a misdemeanor.

While some forms of assailment may in fact be subject to state regulation (such as libel and slander), Florida Statutes §104.38 does not distinguish between those forms of assailment which are subject to state regulation and those forms which are constitutionally protected. Therefore, the statute is overbroad on its face and invalid as violative of the First Amendment.

The overbreadth doctrine focuses directly on the need for precision drafting to avoid conflict with First Amendment rights. The doctrine rejects a "shot-gun approach" to barring unprivileged conduct where First Amendment privileged conduct is also swept within the ambit of the law. It is, after all, primarily the legislature's job to identify features of conduct which cause sufficient harm to public interest to warrant intervention. The key word here is "identify." Where a law fails to clearly "identify" conduct with such specificity as required in order that First Amendment freedoms are not curtailed, the law violates the overbreadth doctrine.

> "The objectional quality of . . . overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative power, but upon the danger of tolerating in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping or improper application."
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> *NAACP v. Button*, 371 U.S. 415 at 432-433 (1963).

C. **Chilling Effect**

The newspaper's right to print what it wishes is protected by the First Amendment. If a newspaper is required, under the threat of the sanctions of the Florida Statute, to provide free space which it does *not* wish to provide and print words which it does *not* wish to print, it may very well be deterred from printing words it *does* wish to print. This chilling effect clearly destroys freedom of the press in its most basic sense.

This Court has repeatedly stated that:

> "The threat of sanction may deter . . . almost as potently as the actual application of sanctions."

NAACP v. Button, supra at 433.

The threat of sanction exerts a chilling effect upon the exercise of First Amendment rights regardless of the chance of success of the threatened sanction, *Dombrowski v. Pfister*, 380 U.S. 479 at 487 (1965). See e.g. *Wolf v. Selective Service Local Board #16*, 372 F.2d 817 (2d Cir. 1967) (Complainant faced with possible induction into the armed services following reclassification after a peaceful protest); *Baggett v. Bullitt*, 377 U.S. 360 (1964) (State employee might have to curb protected activities in order to swear to state loyalty oath); *Speiser v. Randall*, 357 U.S. 513 (1958) (State cannot impose a tax burden for refusal to swear to a loyalty oath, due to its deterrent effect); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 544 (1963) (Disclosure of organizational membership list chills First Amendment right of free association).

A penal statute which is subject to state as well as private enforcement and thereby deters the exercise of First Amendment rights, is unconstitutional because of its chilling effect. Florida Statutes §104.38 is apparently subject to both state as well as private enforcement. The deterring effect on a newspaper's valid exercise of First Amendment freedom of press is brought about by the possibility of a conviction (state enforcement) and injunction or damages (private enforcement) when a newspaper seeks to assert its First Amendment right.

Recent developments in the law of libel stand as an example of how this court may modify subsequent standards to lessen the chilling effect of common law regulation of the dissemination of ideas. *New York Times v. Sullivan, supra; Rosenbloom v. Metromedia, supra.* This court has utilized the concept of chilling to modify the standards to be applied in a libel claim against a public person. The quote "chilling effect" concept supports the view that a public person could prevail in a law suit claiming that certain statements concerning his public actions were libelous only upon a showing that such statements were made with "actual malice" . . . i.e. knowledge of their falsity — or with reckless regard for the truth. This Court has reasoned that would-be critics should not be deterred by the fear of being sued for libel. If they were so stifled, the exercise of First Amendment rights would be hampered.

D. Less Drastic Alternative Doctrine

It is clear that even where the state has a recognized interest in regulating personal freedoms, it must, where those freedoms are fundamental and constitutionally pro-

tected, pursue the least drastic course in furthering its interest. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Shelton v. Tucker*, 364 U.S. 479 (1960); *NAACP v. Button*, *supra*.

The doctrine, first developed where the government sought to regulate freedom of speech, has been expanded to mean that whenever the freedoms to be affected are personal and fundamental, the state is obligated to pursue reasonable alternatives which impose a lesser, rather than a greater, infringement. *Dunn v. Blumstein*, 405 U.S. 330 (1972) (the right to vote); *Shapiro v. Thompson*, *supra* (the right to travel); *Griswold v. Connecticut*, *supra* (marital privacy).

In *Dunn* this Court acknowledged the state's interest in regulating the franchise. Nonetheless, in rejecting Tennessee's durational residence requirement, this court admonished:

> "It is not sufficient for the state to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the state cannot choose means which unnecessarily burden or restrict constitutional protected activity. Statutes affecting constitutional rights must be drawn with precision, and must be tailored to serve the legitimate objectives. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. If it acts

> at all, it must choose less drastic means." (Citations omitted.)
>
> *Id*, at 343.

The interest of the State of Florida in maintaining conditions conducive to free and fair elections.

> "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."
>
> *Shelton v. Tucker*, *supra*, at 488.

There are less drastic alternatives which the State of Florida may pursue.

Obviously, the State of Florida has not sought to avail itself of other less drastic alternatives than interference with freedom of the press.

E. The Missing Requirements of "Truth" and "Fair Comment"

This court has mandated that freedom of the press prohibits any recovery in a libel action unless the Plaintiff shows by clear and convincing proof that the newspaper account was false and was published with actual malice, defined as knowledge by the publisher of falsity or reckless disregard for the truth. *Rosenbloom v. Metromedia, Inc., supra; New York Times Company v. Sullivan, supra.*

Since compulsory printing inhibits freedom of the press at least as much as civil damages, clearly freedom of the press prohibits any legislatively required right to reply, particularly so when libel is not involved. But if some "Right-To-Reply" Law may somehow be constitutional, then a replyer must convincingly demonstrate the newspaper's knowledge of falsity or reckless disregard for the truth. Yet the Florida Statute renders "truth" and "fair comment" totally meaningless and completely unavailable to newspapers as a defense despite the case law cited above.

CONCLUSION

For the foregoing reasons, Amicus respectfully submit that any "Right-To-Reply" Law is inconsistent with the basic command of the First Amendment and this particular statute must also fall due to the other constitutional infirmities set forth herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, JONATHAN L. ALPERT, as a member of the Bar of the Supreme Court of the United States, hereby certify that a true and correct copy of the foregoing Brief of the American Civil Liberties Union of Florida, *Amicus Curiae*, was mailed by United States Mail this ____ day of February, 1974, to each of the following:

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of
KNIGHT NEWSPAPERS, INC.,

Appellant,

v.

PAT L. TORNILLO, JR.,

Appellee.

On Appeal From The Supreme Court of Florida

BRIEF FOR APPELLANT THE MIAMI HERALD PUBLISHING COMPANY

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In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of
KNIGHT NEWSPAPERS, INC.,
Appellant,

v.

PAT L. TORNILLO, JR.,
Appellee.

On Appeal From The Supreme Court of Florida

BRIEF FOR APPELLANT THE MIAMI HERALD PUBLISHING COMPANY

OPENING STATEMENT

Appellant The Miami Herald Publishing Company, a division of Knight Newspapers, Inc. (*"The Herald"*) appeals from the judgment of the Supreme Court of Florida upholding the constitutionality of Section 104.38, Florida Statutes, a criminal statute enacted in 1913 which requires newspapers to provide free space for political candidates to respond to criticism of their candidacies (Florida's "compulsory publication statute").

OPINIONS BELOW

The opinion of the Dade County Circuit Court which declared Section 104.38, Florida Statutes, unconstitutional on its face is reported at 38 Fla. Supp. 80 and is reproduced in the Appendix.[1] The initial *per curiam* opinion of the Florida Supreme Court dated July 18, 1973, which reversed the decision of the Circuit Court, and a *per curiam* opinion denying rehearing dated October 10, 1973, are reported at 287 So.2d 78 and are also reproduced in the Appendix.[2]

JURISDICTION

Claiming a violation of Section 104.38, Florida Statutes, a criminal statute, Appellee Pat L. Tornillo, Jr. ("Tornillo") brought this action as a civil suit seeking

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[1]Appendix ("App.") 11.

[2]App. 15, 39.

to force *The Herald* to print at no cost to Tornillo statements which he had prepared about his political candidacy, and to pay damages for *The Herald's* refusal to do so. The Dade County Circuit Court granted *The Herald's* motion to dismiss the Complaint, holding that the statute on its face violated the First and Fourteenth Amendments to the United States Constitution. Tornillo appealed directly to the Florida Supreme Court. That Court, *per curiam*, reversed the decision of the Dade County Circuit Court, and upheld the constitutionality of the statute. *The Herald* petitioned for a rehearing, which the Florida Supreme Court denied in a second *per curiam* opinion. *The Herald* filed a timely Notice of Appeal to this Court, asserting the Court's jurisdiction under Section 1257(2), Title 28, United States Code, on the basis that the Florida Supreme Court had rendered a final judgment on controlling issues of federal constitutional law. This Court has postponed its final determination on the jurisdictional question.

QUESTION PRESENTED

Does the Florida compulsory publication statute abridge freedom of speech and the press and deny due process of law in violation of the First and Fourteenth Amendments to the United States Constitution by compelling a newspaper, under threat of criminal sanctions and civil liability, to provide free space for a candidate in an election to reply to any publication in the newspaper which "assails [his] personal character," charges him with "malfeasance or misfeasance in office," or "otherwise attacks his official record"?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the United States Constitution provide in relevant part, respectively:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .", and
>
> ". . . no State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

Florida's compulsory publication statute provides:

> "Section 104.38. Newspaper assailing candidate in an election; space for reply. — If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083."

Sections 775.082 and 775.083, Florida Statutes, provide criminal penalties for violations of Section 104.38, and Sections 97.021(1)-(4) and (18) describe the types of elections covered by the law and define the term "candidate."[3]

Wholly apart from the compulsory publication statute, Section 770.02, Florida Statutes, allows an individual who believes himself to have been libeled to request a retraction, and limits recovery for the alleged libel to actual damages where the publisher prints a retraction.[4]

STATEMENT OF THE CASE

In the fall of 1972, Tornillo was a candidate for the Democratic Party nomination for a seat in the Florida House of Representatives. On September 20, 1972 and September 29, 1972, *The Herald* published editorials relating to Tornillo's candidacy.[5]

On September 27 and 30, 1972, relying on the compulsory publication statute, Tornillo demanded that *The Herald* print verbatim and free of cost statements he had prepared and claimed were replies to the editorials.[6] Tornillo did not claim that the editorials were libelous, untrue, or inaccurate, and he did not request a retraction. Several months before Tornillo's demand, the statute had been declared unconstitutional, and the Florida Attorney General had conceded the invalidity of the statute.[7] *The Herald* did not print the material submitted by Tornillo.

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[3]App. 46.

[4]App. 47.

[5]The editorials are at App. 5 and 8.

[6]Tornillo's prepared statements are set forth at App. 6-7, and 9-10.

[7]*State v. News-Journal*, 36 Fla. Supp. 164 (Volusia County J. Ct., Fla. 1972) App. 51.

On October 1, 1972, Tornillo filed a civil action in Dade County Circuit Court seeking to force *The Herald* to publish his statements, and to obtain damages. An emergency hearing was held on October 2, 1972. The Attorney General was represented at the hearing and advised the Court that he would not defend the constitutionality of the compulsory publication statute.[8]

At the conclusion of the hearing, the Circuit Court ordered Tornillo's case dismissed with prejudice, holding: (i) the statute is void on its face as an impermissible restriction upon freedom of the press in violation of the First and Fourteenth Amendments to the Constitution of the United States, and (ii) the statute's vagueness and ambiguity deny due process of law in violation of the Fourteenth Amendment.

Tornillo appealed the judgment of the Circuit Court directly to the Florida Supreme Court. On July 10, 1973, the Florida Supreme Court *per curiam*, one Justice dissenting, reversed the Circuit Court and upheld the validity of the compulsory publication statute. *The Herald* filed a Petition for Rehearing, which was denied in a *per curiam* opinion dated October 10, 1973, one Justice again dissenting.[9] *The Herald* appealed to this Court.

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[8]Section 86.091, Florida Statutes, requires that the Attorney General be notified of any action in which a statute is alleged to be unconstitutional.

[9]Twenty-eight briefs *amicus curiae* (including that of the Attorney General) urged that the statute be declared unconstitutional, and one brief *amicus curiae* supported the validity of the statute. Copies of all briefs *amicus curiae* which were filed in the Florida Supreme Court are contained in the Record before this Court.

ARGUMENT

Introduction and Summary

The Florida statute in question conditions a newspaper's right to publish editorials, news stories, or any other matter criticizing political candidates by requiring that if such matter is printed, the newspaper must provide the candidates free space for a "reply". Violations of the statute are punishable as misdemeanors of the first degree.[10] The Florida Supreme Court held in its opinion below that the statute may also be invoked as the basis for a private action for a mandatory injunction and damages.[11]

The compulsory publication statute lay dormant for 60 years after its enactment in 1913. In its first judicial test in 1972, it was ruled unconstitutional.[12] The Florida statute was likewise declared void by the trial court in this case[13] and the Florida Attorney General refused to support the constitutionality of the statute.[14] Nevertheless, the Florida Supreme Court resurrected the statute and declared that it is not only consistent with the First Amendment,

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[10]Sections 775.082-83 Fla. Stat. provide penalties of up to one year's imprisonment and a fine of up to $1,000 for first degree misdemeanors. App. 48-49.

[11]267 So.2d at 79-80; App. 16-17.

[12]*State v. News-Journal, supra.*

[13]38 Fla. Supp. at 82; App. 12.

[14]38 Fla. Supp. at 83; App. 14. The Attorney General filed a brief *amicus curiae* in the Florida Supreme Court urging affirmance of the Circuit Court's decision. That brief is contained in the Record before this Court.

but that it enhances freedom of speech and press. The Court also held: (a) the statute is a permissible regulation of the press because of the state's interest in fair elections; (b) the alleged ownership concentration of the press requires a right of access to ensure that all opinions will be expressed; (c) the press may be subjected to the same type of regulation as the broadcast media. There is no legal precedent for any of these novel theories; on the contrary, all judicial authority squarely opposes each contention.

The Florida compulsory publication statute is void on its face because it imposes governmental controls on editorial decisions to publish any matter critical of political candidates. Governmental regulation of the content of newspapers by requiring publication is no less an unconstitutional restraint than governmental prohibition upon publication. Governmental control of newspapers for the alleged purpose of promoting "fairness" is censorship. As such, it is the exact opposite of the freedom of speech and press guaranteed by the First Amendment.

The "fairness doctrine" applicable to the broadcast media may not be constitutionally applied to newspapers. The validity of the fairness doctrine rests solely on the unique technological limitations inherent in broadcast media.

The Florida statute's direct intrusion upon freedom of the press may not be justified by the state's interest in "fair" elections, or by any other asserted state interest. Alleged economic concentration in the media cannot justify abridgement of First Amendment freedoms.

The effect of the statute, if upheld by this Court, will be to suppress rather than enhance public debate. Printing replies in compliance with the statute will force newspapers to surrender their editorial freedom and impose substantial economic burdens. To avoid this compulsion, newspapers will restrict or eliminate publication of criticism and comment on political candidates.

In addition to its direct infringement upon First Amendment rights, the Florida criminal statute at issue in this case denies due process guaranteed by the Fourteenth Amendment, because the statute is excessively broad, vague, and ambiguous. The Florida Supreme Court attempted to cure through interpretation some of the more obvious of these defects in the statute, but the effort simply revealed more clearly the unconstitutional deficiencies which permeate the statute.

The Florida Supreme Court has conclusively determined the constitutional issues presented by this case. The decision below is "final" for purposes of Section 1257 (2), Title 28, United States Code.

A. The Florida compulsory publication statute is void on its face because it seeks to regulate the content of newspapers in violation of the First Amendment's guarantees of free speech and press.

1. *The Florida statute's requirement to print is equivalent to censorship.*

The Florida compulsory publication statute violates the First Amendment because it substitutes governmental fiat for editorial freedom. "For better or worse, editing is what editors are for; and editing is selection and choice of material."[15]

Governmental compulsion to print is in direct contradiction to freedom of the press. "[T]he determination of what news is — the selectivity of the press — lies close to the heart of a press that may speak, or not speak, as it sees fit."[16]

Forced publication is a form of regulation as pernicious as direct censorship. As the trial court held in declaring the Florida statute unconstitutional, "clearly if the State may not prohibit what a newspaper may print it cannot assume the editorial function and direct a newspaper what to print."[17] Professor Chafee warned: "liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper."[18]

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[15]*Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 36 L.Ed.2d 772, 796 (1973).

[16]*Cook v. Advertiser Company*, 458 F.2d 1119, 1123 (5th Cir. 1972) (Judge Wisdom, concurring.)

[17]38 Fla. Supp. at 82; App. 13.

[18]II Chafee, Government and Mass Communications 633 (1947).

Under the compulsory publication statute, any criticism in news stories, editorials, and commentaries of a newspaper which "assails" a political candidate, charges him "with malfeasance or misfeasance," or "otherwise attacks his official record" triggers the right of free space for a reply. It is irrelevant to the operation of the statute whether the critical story or column was written by the newspaper itself or appears as the result of an editorial decision to print a syndicated column or story from the wire services. More importantly, the statute allows no exception for publications which are true and non-libelous. Once material critical of a candidate is published, the statute, by its terms, leaves the newspaper with absolutely no choice: it must publish verbatim a "reply" or face criminal sanctions.

The Florida Supreme Court theorized that the compulsory publication statute "does not constitute an incursion upon First Amendment rights or a prior restraint, since no *specified newspaper content is excluded.*"[19] That theory is untenable. "There is no difference between compelling publication of material that the newspaper wishes not to print and prohibiting a newspaper from printing news or other material."[20]

The general thrust of the Florida Supreme Court's opinion appears to be that governmental regulation of the content of newspapers is required to ensure that all voices who want to speak out have access to newspapers so that the people may have the fullest flow of information. The

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[19] 287 So.2d at 82; App. 22

[20] *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 135 (9th Cir. 1971).

Florida Supreme Court insists that the statute enhances rather than diminishes First Amendment values by providing the newspaper reader with "the whole story, rather than half of it . . ."[21] Governmental efforts to impede and restrict criticism by the press are invariably couched in terms of achieving some worthy social goal at the cost of only minor restrictions upon freedom of the press. "There is never a paucity of arguments in favor of limiting the freedom of the press."[22]

The theory adopted by the Florida Supreme Court that greater freedom of expression can be obtained through governmental regulation of the press conflicts directly with the language and spirit of the First Amendment.[23] The First Amendment promotes full discussion of issues and robust debate, but not by regulating the fairness or balance of any individual element of the press, and not by

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[21]287 So.2d at 87; App. 33.

[22]*Columbia Broadcasting System v. Democratic National Committee*, *supra* at 807-808 (Mr. Justice Stewart, concurring.) Muzzling the critical voice of the press has been attempted, for example, in the name of fair elections, *Mills v. Alabama*, 384 U.S. 214 (1966); protection of personal reputation, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); community morality, *Winters v. New York*, 333 U.S. 507 (1948); combatting racial discrimination in housing, *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); and national security, *New York Times Co. v. United States*, 403 U.S. 713 (1971). Each of these efforts was rejected by the Court.

[23]Judge Bazelon has written: "To argue that a more effective press requires a more regulated press flies in the face of what history has taught us about the values and purposes of protecting the individual's freedom of speech." *Brandywine-Main Line Radio, Inc. v. F.C.C.*, 473 F.2d 16, 79 (D.C. Cir. 1972) (dissenting opinion).

guaranteeing every individual access to any forum he desires. This basic principle was reiterated by the Court last term in *Columbia Broadcasting*. In rejecting a general claim of private access rights to the broadcast media, the Chief Justice's opinion for the Court analyzed the limited scope of the regulation of broadcast media permitted by the First Amendment, and distinguished the freedom accorded newspapers. The First Amendment gives newspapers freedom to advocate their own views, undeterred by any requirement to meet a governmentally imposed standard of "fairness".

> "The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers — and hence advertisers — to assure financial success; and, second, the journalistic integrity of its editors and publishers."[24]

The concurring opinion of Mr. Justice Douglas reemphasized the First Amendment's prohibition of any governmental interference with the editorial discretion of the press.

> "It would come as a surprise to the public as well as to publishers and editors of newspapers to be informed that a newly created federal bureau would hereafter provide 'guidelines' for newspapers or promulgate rules that would give a federal agency power to ride herd on the publishing business to make sure that fair comment on all issues was made.
>
> • • •

[24] 36 L.Ed.2d at 792.

> "Of course there is private censorship in the newspaper field. But for one publisher who may suppress a fact, there are many who will print it. But if the government is the censor, administrative fiat not freedom of choice carries the day."[25]

Mr. Justice Stewart's concurring opinion summarized the essence of freedom of the press as follows: "[T]he First Amendment's guarantee of a free press . . . gives *every* newspaper the liberty to print what it chooses and reject what it chooses, free from the intrusive editorial thumb of Government."[26]

Other recent decisions of this Court have emphasized that no governmental mandate to print can be consistent with the First Amendment. In *Branzburg v. Hayes*,[27] the Court noted carefully that the case involved "no prior restraint or restriction on what the press may publish and no express or implied command that the press publish what it prefers to withhold."[28] Similarly, in *Pittsburgh Press Co. v. Human Rela. Comm.*,[29] the Court stated that its decision did not

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[25]36 L.Ed.2d at 811, 812.

[26]36 L.Ed.2d at 808. The dissenting opinion of Mr. Justice Brennan, in which Mr. Justice Marshall joined, indicated his agreement with the majority of the Court as to the unconstitutionality of any attempt to regulate the content of newspapers. "[S]uch regulation of newspaper would be impossible. . . ." *Id* at 829 n. 12.

[27]408 U.S. 665 (1972).

[28]*Id.* at 681.

[29]37 L.Ed.2d 669 (1973).

> "authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial."[30]

The theory adopted by the Florida Supreme Court that the First Amendment permits governmental regulation to compel a newspaper to publish against its will has been uniformly rejected by all other courts which have considered the issue, including three Circuit Courts of Appeal, several District Courts, and the Supreme Judicial Court of Massachusetts. This line of authority was ignored by the Florida Supreme Court.

In *Chicago Joint Board, Amal. Cloth. Workers v. Chicago Tribune Co.*,[31] a newspaper refused to publish advertisements submitted to it by a labor union, which presented the union's views on a pending labor dispute. The Seventh Circuit held that an attempt to compel publication would violate the First Amendment:

> "It is urged that the privilege of First Amendment protection afforded a newspaper carries with it a reciprocal obligation to serve as a public forum, and if a newspaper accepts any editorial advertising it must publish all lawful editorial advertisements tendered to it for publication at its established rates. We do not understand this

[30] *Id.* at 680.

[31] 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971).

> to be the concept of freedom of the press recognized in the First Amendment. The First Amendment guarantees of free expression, oral or printed, exist for all . . . . The Union's right to free speech does not give it the right to make use of the defendants' printing presses and distribution systems without defendants' consent."[32]

The constitutional issues involved in an attempt to compel a newspaper to publish were also squarely faced by the Ninth Circuit in *Associates & Aldrich Co. v. Times Mirror Co.*[33] The Court there upheld a newspaper's refusal to accept certain proffered advertising without modifications requested by the newspaper. "Appellant has not convinced us that the Courts or any other governmental agency should dictate the contents of a newspaper."[34]

A similar result was reached by the Third Circuit in *Avins v. Rutgers, State University of New Jersey*,[35] where the plaintiff sought to compel the Rutgers Law Review to publish an article which its editors had previously rejected. The Court refused to compel publication, holding that the would-be journalist did "not have the right, constitutional or otherwise, to commandeer the press and columns of the Rutgers Law Review . . . to the exclusion of other articles deemed by the editors to be more suitable for publication."[36]

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[32] *Id.* at 478.

[33] 440 F.2d 133 (9th Cir. 1971).

[34] *Id.* at 135 (footnote om.).

[35] 385 F.2d 151 (3rd Cir. 1967).

[36] *Id.* at 153.

A three-judge District Court in *Resident Participation of Denver, Inc. v. Love*,[37] also resisted arguments for revising the First Amendment to allow the government to compel publication:

> "We are aware that lack of access to those media which reach large audiences has, some believe, given birth to a frustration which compels otherwise peaceful citizens to engage in violence to get their view to the nation. A cause of this frustration, one critic maintains, is that, although the courts have been vigorous in protecting free speech, they have been indifferent to creating opportunities for expression. Barron, Access to the Press — A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967). We note, however, that while Professor Barron spends considerable space exploring a statutory solution to this problem, he devotes much less attention to constitutional arguments and but one paragraph to the problem of state action, which we find insurmountable. Professor Barron simply concludes without noticeable explanation, that newspapers can be subjected to the 'constitutional restrictions which quasi-public status invites.' *Id.* at 1669. As desirable as this result might be, we are unable in good faith to reach it."[38]

Likewise, in *Brown v. Murphy*[39] and *Yablonski v.*

[37] 322 F.Supp. 1100 (D. Col. 1971).

[38] *Id.* at 1105.

[39] 355 F.Supp. 416, 417 (S.D.N.Y. 1973) (". . . courts or other governmental agencies should not encroach upon freedom of the press by dictating the contents of private publications.")

United Mine Workers of America,[40] District Courts held that compulsory publication was prohibited by the First Amendment. The same conclusion was reached by the Supreme Judicial Court of Massachusetts in declaring unconstitutional a proposed statute which would have required newspapers to publish political advertising.[41]

Each of the cases discussed above involved a claim that the Courts should compel access to the press in order to enhance First Amendment values. In this case, the Florida legislature has mandated a similar compulsory publication. Whether governmental compulsion is by court decree,[42] or by statute,[43] is constitutionally irrelevant. As all decisions prior to that of the Florida Supreme Court unanimously held, the First Amendment forbids *any* governmental regulation of the content of a newspaper.

Pointedly ignoring the uniform direct precedents, the Florida Supreme Court claimed support for its contrary

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[40]305 F.Supp. 868, 872 (D.D.C. 1969) (to "require defendants to print certain material supplied by plaintiff . . . would be a clear violation of the First Amendment . . . .")

[41]*Opinion of the Justices*, 298 N.E.2d 829 (Mass. 1973)

Without resort to constitutional grounds, numerous other cases have held that a newspaper is not a "public utility" compelled to accept and publish all advertising proffered to it. *E.g.*, *McGill v. State*, 209 Ga. 500, 74 S.E.2d 78, 81-82 (1953); *Chronicle & Gazette Pub. Co., Inc. v. Attorney General*, 94 N.H. 148, 48 A.2d 478, 482 (1946), *appeal dismissed*, 329 U.S. 690 (1947); *Shuck v. Carroll Daily Herald*, 215 Iowa 1276, 247 N.W. 813 (1933); *In re Louis Wohl*, 50 F.2d 254, 255 (E.D. Mich. 1931); *Friedenburg v. Times Pub. Co.*, 170 La. 3, 127 So. 345 (1930); *Poughkeepsie Buying Service, Inc. v. Poughkeepsie Newspapers, Inc.*, 205 Misc. 982, 131 N.Y.S.2d 515 (1954); *see Associated Press v. U.S.*, 326 U.S. 1, 19 (1945).

[42]*E.g.*, *Chicago Joint Board, Amal. Cloth. Workers* v. *Chicago Tribune Co.*, *supra.*

[43]*Opinion of the Justices*, *supra.*

view from a footnote in the plurality opinion of Mr. Justice Brennan in *Rosenbloom v. Metromedia.*[44] This note plainly does not support the constitutionality of the compulsory publication statute at issue in this case.

Mr. Justice Brennan's opinion in *Rosenbloom* concluded that the privilege originally held applicable to libel actions by public officials in *New York Times Co. v. Sullivan*[45] should be extended to cover all matters of public concern. In answering an argument that persons involved in matters of public concern might not have as much access as public officials to public media for purposes of responding to defamation, Mr. Justice Brennan made the footnote

[44]403 U.S. 29 (1971). In the footnote, Mr. Justice Brennan stated:

"Some States have adopted retraction statutes or right-of-reply statutes. See Donnelly, The Right of Reply: An Alternative to an Action for Libel, 34 Va. L.Rev. 867 (1948); Note, Vindication of the Reputation of a Public Official, 80 Harv. L.Rev. 1730 (1967). Cf. *Red Lion Broadcasting Co., v. FCC*, 395 U.S. 367 (1969).

'One writer, in arguing that the First Amendment itself should be read to guarantee a right of access to the media not limited to a right to respond to defamatory falsehoods, has suggested several ways the law might encourage public discussion. Barron, Access to the Press — A New First Amendment Right, 80 Harv. L.Rev. 1641, 1666-1678 (1967). It is important to recognize that the private individual often desires press exposure either for himself, his ideas, or his causes. Constitutional adjudication must take into account the individual's interest in access to the press as well as the individual's interest in preserving his reputation, even though libel actions by their nature encourage a narrow view of the individual's interest since they focus only on situations where the individual has been harmed by undesired press attention. A constitutional rule that deters the press from covering the ideas or activities of the private individual thus conceives the individual's interest too narrowly.'" 403 U.S. at 47 n. 15

Contrary to the characterization in the opinion of the Florida Supreme Court, there was no majority opinion in *Rosenbloom.*

[45]376 U.S. 254 (1964).

observation that "some states have adopted retraction statutes or right of reply statutes." Mr. Justice Brennan's dictum is plainly not a blanket approval of the constitutionality of all statutes which purport to create a right of "reply." The law review articles cited by Mr. Justice Brennan discuss a right of "reply" concept solely in the context of libelous and inaccurate publications. Permissive right of "reply" statutes are suggested, for example, as an alternative to retraction statutes as a basis for barring recovery of punitive damages for libel against a newspaper which chooses to publish such a reply. The footnote lends no support to the Florida statute, which is not restricted to libel, but also applies to any criticism of political candidates, and which is compulsory under threat of criminal sanction.

2. *The "fairness doctrine" is not constitutionally applicable to newspapers.*

In upholding the constitutionality of the compulsory publication statute, the Florida Supreme Court relied heavily upon the decision of this Court in *Red Lion Broadcasting Co. v. F.C.C.*,[46] which sustained the constitutionality of the "fairness doctrine" and corollary regulations such as the "personal attack rules" which have been imposed upon broadcast media (radio and television) by the Federal Communications Commission. In disregard of the careful distinction established by this Court between broadcast media and the printed press, the Florida Supreme Court asserted that *Red Lion* sets forth guidelines which are generally applicable to both.[47] In

[46]395 U.S. 367 (1969).

[47]*E.g.*, 287 So.2d at 83-84, 87; App. 24-25, 32.

addition, the state court contended the fairness doctrine may be made directly applicable to newspapers because the press uses telecommunications in its operations.

> "Newspapers are not wholly dependent on electronic media as were the broadcasters in *Red Lion Broadcasting Co. v. F.C.C., supra.* However, we have no difficulty in taking judicial notice that the publishers of newspapers in this contemporary era would perish without this vital source of communications. The dissemination of news other than purely local is transmitted over telegraph wires or over air waves. This not only includes dissemination of news but also in chain newspapers operations so prevalent today, the Miami Herald being one; even editorials are prepared in one place and transmitted electronically to another. Therefore, the principles of law enunciated in *Red Lion Broadcasting Co. v. F.C.C., supra,* have been taken into consideration in reaching our opinion."[48]

In seeking to extend the fairness doctrine to the printed press, the Florida Supreme Court ignored the repeated statements of this Court in *Red Lion* itself, and subsequently in *Columbia Broadcasting*, that the fairness doctrine is a narrow exception to general First Amendment principles, applicable solely to broadcast media, and explicitly inapplicable to the press. The constitutionality of the "fairness doctrine" has been sustained by this Court solely on the basis of the unique technological limitations upon the availability of the broadcast media. Then Circuit

[48] 287 So.2d at 86-87; App. 32.

Judge Burger emphasized the distinctions between newspapers and the broadcast media in *Office of Communication of United Church of Christ v. F.C.C.*:

> "A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot."[49]

This distinction was repeated by Chief Justice Burger at the outset of the *Columbia Broadcasting* decision:

> "[T]he broadcast media pose unique and special problems not present in the traditional free speech case. Unlike other media, broadcasting is subject to an inherent physical limitation. Broadcast frequencies are a scarce resource; they must be portioned out among applicants.... The Court spoke to this reality when, in Red Lion, we said 'it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.' Red Lion, supra, 395 U.S., at 388, 23 L.Ed. 2d 371."[50]

Columbia Broadcasting resolved any doubt that *Red Lion* could be read to mandate regulation of the content of newspapers. *Columbia Broadcasting* held that a broadcaster may not be forced to accept paid political advertis-

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[49]359 F.2d 994, 1003 (D.C. Cir. 1966).

[50]36 L.Ed.2d at 783.

ing, because governmental intrusion upon the exercise of "journalistic discretion" to determine what should or should not be broadcast contravenes the "rigid limitations" of the First Amendment. The Court denied any general right of private access to the broadcast media:

> "To agree that debate on public issues should be 'robust, and wide-open' does not mean that we should exchange 'public trustee' broadcasting, with all its limitations, for a system of self-appointed editorial commentators."[51]

The Florida Supreme Court, after the assertion by Justice Roberts[52] that *Columbia Broadcasting* is "not applicable" to the Florida compulsory publication statute because of the distinction between broadcast media and newspapers, reached the astonishing conclusion that newspapers may be subjected to greater governmental control than *Columbia Broadcasting* would permit as to broadcasters.

Columbia Broadcasting held that broadcasters cannot constitutionally be compelled to abdicate editorial discretion and accept material for broadcast against their will. *A fortiori*, newspapers, with a greater range of discretion, cannot be subjected to a compulsory publication rule. Every opinion in *Columbia Broadcasting* noted that whatever regulation might constitutionally be applied to the broadcast media, no regulation of the content of newspapers was permissible.

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[51]36 L.Ed.2d at 796.

[52]*Columbia Broadcasting* was cited only in Mr. Justice Robert's concurring opinion, joined by five other Justices, not in the Court's *per curiam* opinion. 287 So. 2d at 87-88; App. 33-36.

3. *There is no compelling state interest to justify upholding the Florida statute.*

The Florida Supreme Court asserted that even if the compulsory publication statute abridged freedom of the press, there were two specific grounds for upholding the constitutionality of the statute: the interests of the state in ensuring fair elections and in preventing monopolistic abuses arising from alleged concentration of the media. Neither ground affords any basis for sustaining the constitutionality of the statute's undeniable direct regulation of the content of newspapers.

a. The state's interest in ensuring fair elections is insufficient justification.

The Florida Supreme Court's contention that the compulsory publication statute can be justified by the legislative purpose of ensuring fair elections directly contradicts this Court's express holding in *Mills v. Alabama*.[53] In *Mills*, a newspaper editor was indicted for publishing an editorial in violation of an Alabama statute which made it a crime to publish on election day matter which was designed to influence the election. The Alabama Supreme Court held that the statute's restrictions upon free speech and press were a valid exercise of the state's police powers, because it protected the public from last minute charges on election day to which the other side had no time to reply.

This Court held that the state's argument for upholding the statute had a "fatal flaw," and that:

[53] 384 U.S. 214 (1966).

> "no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election."[54]

On the same ground, a three-judge District Court in *American Civil Liberties Union, Inc. v. Jennings*,[55] held Title I of the Federal Election Campaign Act of 1971[56] violative of the First Amendment, because it forbids newspapers from publishing political advertising without obtaining assurances that the advertising complies with that Act. The Court held that the legislative purpose of enhancing the fairness of elections could not justify the statute's infringement on freedom of the press. "The fact that restrictions have been imposed in furtherance of matters of legitimate governmental concern is neither dispositive nor, in this instance, persuasive."[57]

The Florida Supreme Court's argument that the Florida statute is essential (or even useful) to fair elections is belied by the fact that it was forgotten as soon as it was enacted in 1913.[58] Likewise, there can be no contention that

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[54]384 U.S. at 220.

[55]366 F.Supp. 1041 (D.D.C. 1973).

[56]47 U.S.C.A. Sections 801, et seq.

[57]366 F.Supp. at 1051.

[58]It seems equally likely that the primary purpose of the Florida statute was to protect incumbents, who are the only political candidates able to invoke the statute on the grounds of a charge of "malfeasance or misfeasance" in office, or an attack on their "official record."

in the only two other states which have ever enacted compulsory publication statutes, elections were in any way more fair or informed as a result of those statutes.[59]

There is no precedent to indicate that unbridled circulation of a candidate's campaign rhetoric would contribute in any measurable way to a "fair" election. As discussed in Section 4, *infra*, the effect of the statute, if upheld by this Court, will be to decrease, not increase, the flow of meaningful public information during elections.

b. Alleged concentration in the media is insufficient justification.

The Florida Supreme Court insists alternatively that governmentally compelled publication is constitutionally permissible because of alleged economic concentration in the media.[60]

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[59]Miss. Code Ann. §3175 (1942); Nev. Rev. Stat. §200.570 (1963). The Mississippi statute was made into a typical libel statute in *Manasco v. Walley*, 63 So.2d 91 (Miss. 1953), which held that the statute could be invoked only if the publication concerning the candidate was libelous. Nevada repealed its mandatory "right of reply" statute in 1969 and replaced it with a typical libel retraction statute. Ch. 310, Laws of Nevada, Fifty-fifth Session (Act of April 14, 1969).

[60]"The right of the public to know all sides of a controversy and from such information to be able to make an enlightened choice is being jeopardized by the growing concentration of the ownership of the mass media into fewer and fewer hands, resulting ultimately in a form of private censorship. Through consolidation, syndication, acquisition of radio and television stations, and the demise of vast numbers of newspapers, competition is rapidly vanishing and news corporations

Assuming, *arguendo*, the existence of economic concentration in the media, this assumption can provide no justification for the Florida statute's direct intrusion upon First Amendment rights. The anti-trust laws are adequate to deal with such problems, if they are found to exist in fact. This Court held in *Associated Press v. United States*,[61] that the First Amendment does not shield the press from violations of the federal anti-trust law. However, the Florida Supreme Court ignored this Court's careful distinction that its decision did not permit regulation of the content of the news.

> "The decree does not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published."[62]

The Florida Supreme Court cited *Associated Press* for its proposition that the forced publication statute is constitutional. But *Associated Press* stands for exactly the opposite conclusion, showing that alleged monopolization may not be cured by abridging the First Amendment, but only by application of the anti-trust laws.

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are acquiring monopolistic influence over huge areas of the country. We take note of a recent article in Florida Trend magazine, March 1973, explicating that the Miami Herald is the largest newspaper published in Florida, that it is larger in size than the next two largest newspapers; and that it is not only a large city daily newspaper but also is a regional and international newspaper." 287 So.2d at 82-83; App. 22-23. The sole basis for the Court's allegations of media concentration and monopolistic tendencies was the magazine article referred to above. There was nothing in the record before the Florida Supreme Court which evidenced the alleged concentration.

[61] 326 U.S. 1 (1945).

[62] *Id.* at 20 n. 18.

In contrast to the holding of the Florida Supreme Court, the Supreme Judicial Court of Massachusetts ruled last year in an advisory opinion to the Massachusetts Legislature that a proposed statute which sought to compel publication of political advertising would be unconstitutional, despite claims that the statute was needed to deal with alleged monopolization in the media.

> "The situation at which [the proposed statute] is directed may be the 'monopolistic' status of certain news publications. However, compulsion to publish all responsive political advertisements, applicable to all newspapers and other publications of general circulation in the Commonwealth, goes beyond what is essential to the furtherance of any interest of a State in its citizens having a right of access to newspapers in order to express, at their expense, political ideas which otherwise would not be published. See Barron, Access to the Press—A New First Amendment Right, 80 Harv.L.Rev. 1641, 1676-1678. Indeed no set of circumstances may exist which would support a legislative mandate that a newspaper or other publication of general circulation must publish a political advertisement. The views expressed and implied in the opinion of the court and in the dissenting opinions in the *Pittsburgh Press Co.* case, *supra*, create substantial doubt that such legislation would pass constitutional muster."[63]

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[63] *Opinion of the Justices*, *supra* at 835 (footnote om.).

The separate opinion of Mr. Justice Douglas in *Columbia Broadcasting* also recognized and disposed of the contention that alleged concentration in the media can be cured by government regulation of the content of the press:

> "Thomas I. Emerson, our leading First Amendment scholar has stated that
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> '. . . any effort to solve the broader problems of a monopoly press by forcing newspapers to cover all "newsworthy" events and print all viewpoints, under the watchful eyes of petty public officials, is likely to undermine such independence as the press now shows without achieving any real diversity.' The System of Freedom of Expression (1970), p. 671."[64]

4. *The Florida statute, if upheld, will suppress public debate.*

It is clear from the statements of the *amici curiae* before this Court and the Florida Supreme Court that the compulsory publication law will seriously inhibit free discussion and criticism of political candidates.[65] The statute "dampens the vigor and limits the variety of public debate."[66]

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[64]36 L.Ed.2d at 811.

[65]See, for example, the following briefs *amicus curiae* filed in this Court: Brief for Chicago Tribune Company at 10-11; Brief for Reporters Committee for Freedom of the Press Legal Defense and Research Fund at 19; Brief for Washington Post Company at 10; Brief of The Times Mirror Company at 14; and see, for example, the following briefs *amicus curiae* filed in the Florida Supreme Court: Brief of The Tallahassee Democrat at 2-4; Brief of The Sun-Journal at 2-4.

[66]*New York Times Co. v. Sullivan, supra* at 279.

Compliance with the statute would interfere with virtually every aspect of newspaper publication.[67] Speeches of political candidates, which invariably contain direct or oblique criticism of opponents, could not be reported without assuming an obligation to print a "reply" by the opponent. Syndicated columns critical of political candidates could not be published without the assumption of an obligation for "replies" from those criticized. Editorial endorsements of candidates could not be made without creating a duty to publish a "reply" written by other candidates. Political advertising of political candidates which comments adversely on opponents or criticism of the public record of incumbents could not be accepted without generating an obligation to print a free response. Where multiple candidates seek a political office, multiple responses, and perhaps even round-robin responses, could be anticipated.

To comply with the statute would force newspapers printing criticism of political candidates to become bulletin boards for an endless stream of self-serving political propaganda. Since all publication compelled by the Florida statute would be made at the newspaper's expense, the resulting financial burden would be substantial.

The requirement to subsidize political candidates would, ironically, fall heaviest upon those newspapers which exercise the greatest degree of civic responsibility by extensively covering political campaigns. While the impact would be severe even on large metropolitan news-

[67]The adverse effect of the statute upon the publication of a newspaper is greatly exacerbated by the vagueness and ambiguity of the statute's terms, as discussed in Section B, *infra*.

papers, an even more substantial, perhaps fatal, effect would be felt by small newspapers.[68]

To minimize the extent to which they would be forced to yield their editorial discretion, as well as to avoid the consequent practical and economic burdens, most newspapers would undoubtedly seek to restrict the amount of political criticism which they publish.[69] Some newspapers might totally abandon publication of any matter which could conceivably trigger the statute. The tendency will be, at least, "To make statements which 'steer far wider of the unlawful zone.' "[70] Publications with a distinct political viewpoint which were formed for the primary purpose of engaging in sharp criticism of political candidates of opposing political persuasion would be eliminated.

Mr. Justice Douglas recognized in his concurring opinion in *Columbia Broadcasting*,

> "The monetary and other burdens imposed on the press by the right of a criticized person to reply, like the traditional damage remedy for libel, lead of course to self-censorship respecting matters of importance to the public that the First

[68] *See e.g.*, Lange, "The Role of Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment," 52 *N.C. L.Rev.* 1, 70 (Nov. 1973).

The financial impact of compliance with the compulsory publication law raises serious questions of taking private property without compensation in violation of the Fourteenth Amendment. *See, e.g., Pennsylvania Coal Co. v. Malion*, 260 U.S. 393 (1922). The expense of forced publication of replies likewise would amount to an unconstitutional tax. *Cf. Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

[69] Lange, *supra* at 71.

[70] *New York Times v. Sullivan, supra* at 279.

Amendment denies the Government the power to impose."[71]

The Supreme Judicial Court of Massachusetts reached the same conclusion in ruling unconstitutional a proposed statute which would have required newspapers to print paid political advertisements. The Court held that the proposed statute would create a paradox, because "instead of achieving a fairer dissemination of political advertising," it might have the opposite result of producing a "chilling effect of discouraging newspapers and other affected publications from accepting any political advertisements." The Court recognized that "A newspaper or other publication of general circulation may decide to publish no political advertisements on an election issue rather than expose itself to a commitment to publish all responsive advertisements."[72]

The impact of upholding the constitutionality of the compulsory publication law would not be confined only to political campaigns in Florida.[73] If this statute can be sustained, it requires little imagination to forsee the extension of the statute to cover criticism of public officials, and ultimately to criticism or comment of any person on any subject. If the government can regulate the content of the newspapers, it is difficult to perceive any remaining objection to licensing of the press, and total governmental control of the content of all newspapers. "It is a frightening specter."[74]

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[71] 36 L.Ed.2d at 821, n. 18.

[72] *Opinion of the Justices, supra* at 833-4.

[73] The statute presumably applies to newspapers published outside Florida which circulate in that state.

[74] *Columbia Broadcasting System v. F.C.C., supra* at 801 (Mr. Justice Stewart concurring).

B. The Florida statute is void for vagueness.

The opinion of the trial court in this case specifically held Florida's compulsory publication statute:

> "impermissibly vague . . . [since] no editor could know from the statute exactly what words would offend the statute. . . . A state may not enact such a broad statute and leave it to the courts, on a case by case basis, to determine the constitutionality of its application to various circumstances. . . ."[75]

This analysis concisely summarizes the circumstances in which this Court has long applied the due process guarantees of the Fourteenth Amendment to protect First Amendment rights.[76]

The present case presents a classic situation for invoking the judicial remedy of voiding, rather than construing, statutes which "chill" First Amendment liberties, because the statute requires individuals to guess the scope of permissible conduct at their peril.[77] The Florida Supreme Court tried to resolve constitutional problems in the compulsory publication statute by interpretation rather than

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[75]38 Fla. Supp. at 80; App. 13.

[76]Note, *The Void-for-Vagueness Doctrine in the Supreme Court—A Means to an End*, 109 U. Pa. L.Rev. 67 (1960) (prepared by Anthony Amsterdam).

[77]This Court has held that a statute chilling free press rights is impermissibly vague if "an honest distributor of publications could [not] know when he might be held to have ignored [its] prohibition." *Winters v. New York*, 333 U.S. 507, 520 (1948).

by invalidation.[78] This Court has said, however, that statutes affecting First Amendment rights are not so easily rewritten. Judicial construction is not acceptable in the face of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ."[79] Invalidation in such cases is the only recourse.

> "It is settled that a statute, so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment."[80]

On the basis of these established principles Florida's compulsory publication statute requires voiding, not re-writing. The statute is replete with vagueness and ambiguity. Among the principal questions raised by the statute are the following:

(i) Does the term "newspaper" include any printed publication, such as magazines, newsletters, pamphlets, brochures and handbills? Does it include "newspapers" published in other states but circulated in Florida?

(ii) Does the term "columns" include editorials, signed columns, news articles and letters to the editor?

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[78] 287 So.2d at 85; App. 28. Not one of the authorities relied upon by the Florida Court for its application of this principle involved First Amendment rights.

[79] *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

[80] *Winters v. New York, supra* at 509.

Does the term include advertisements? Cartoons? Does the term include statements published pursuant to the compulsory publication statute?

(iii) What constitutes assailing the "personal character" of a political candidate or an "attack" upon his official record? Do these terms encompass mere criticism, no matter how truthful or valid? Do they apply equally to factual statements and expressions of opinion? Does "personal character" include any individual human quality?[21] Was the decision of the Florida Supreme Court below an "official record" of the elected justices comprising the majority?

(iv) Need a "candidate" be mentioned specifically by name to be entitled to compel publication of a reply, or does a reply right arise if a "candidate" can be identified in a publication, even though not named? If a publication refers to a group, does each member of the group have a right to reply?

(v) What is an equally "conspicuous" place for publication of a reply? Is page four of a newspaper as conspicuous as page five?

(vi) How lengthy a reply may be made? If a newspaper editorial states only, "John Doe is not fit for office," what is the length of the permitted reply? Seven words? Can a statute providing such a "reply" be seriously considered as enhancing public discussion?

The Florida Supreme Court recognized the ambiguity in the statute and sought to resolve it by construing "any

[21]The Florida Supreme Court characterized *The Herald* editorials upon which Tornillo based his suit as "attacking" his personal character, 287 So.2d at 79; App. 33, although they can fairly be read as dealing with Tornillo's fitness for office.

reply" to mean only a "wholly responsive reply" which is "neither libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane." The Court sought to avoid the presumption of invalidity applicable to criminal laws affecting the First Amendment rights by holding that only civil remedies were being sought under the criminal statute and if the statute was insufficiently precise as a criminal statute, its criminal penalties could be "easily severed", leaving a valid implied right of civil action based upon the void criminal statute.

The Florida Supreme Court failed to resolve any of the real constitutional concerns posed by the statute. The vagueness of the statute's initial applicability, as contained in such statutory terms as "in its columns", "assails [a candidate's] personal character," and "otherwise attacks his official record," is matched by the residual ambiguity of the Florida Supreme Court's effort to define the statute's terms. Both the statute written by the Legislature and the statute re-written by the Florida Supreme Court impose pre-publication, chilling perils on the editing process. Even so basic a question as the law's scope of coverage (the statute applies to any "newspaper") requires a perilous pre-publication judgment. Even if the statute's criminal penalties were eliminated, its constitutional deficiencies world remain. Tornillo seeks compensatory and punitive damages.[32] "The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute."[33]

In short, all of the vagueness which leaves the exercise of free expression in doubt still lurks in Florida's judicially-amended, compulsory publication statute.

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[32] 287 So.2d at 79; App. 16.

[33] *New York Times Co. v. Sullivan, supra* at 277.

> "It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all."[84]

Under these circumstances, this Court has repeatedly acted to preserve the buffer zone surrounding First Amendment guarantees by applying the doctrine of "void for vagueness." *E.g., Smith v. California*, 361 U.S. 147 (1959); *Watkins v. U.S.*, 354 U.S. 178 (1957); *Winters v. New York*, 333 U.S. 507 (1948); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

C. The Court has jurisdiction to hear this appeal.

In response to *The Herald's* Jurisdictional Statement, Tornillo raised a question whether the decision of the Florida Supreme Court is technically final for purposes of 28 U.S.C. Section 1257(2).[85] Tornillo concedes, as he must, that the Florida Supreme Court has ruled squarely on the controlling constitutional issues, that the decision is binding on the trial court and all other courts in Florida, and that the constitutional issues are substantial. Nonetheless, Tor-

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[84] *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287 (1961), citing *Champlin Ref. Co. v. Corp. Comm'n of Oklahoma*, 286 U.S. 210, 243.

[85] "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

nillo suggests a lack of finality because the Florida Supreme Court remanded for "further proceedings not inconsistent with its opinion".[86] Tornillo suggests that unless *The Herald* abandons any non-constitutional defenses it may have, his controversy with *The Herald* may not be ended for purposes of Section 1257[87] and Supreme Court review is consequently barred.

Tornillo misconceives the meaning of finality. In *Mills v. Alabama, supra*, this Court held that a decision of the Alabama Supreme Court was final even though the case was similarly remanded by the state court for further proceedings not inconsistent with its opinion. As in this case, it was argued in *Mills* that the appeal should be dismissed because a trial would be required to determine facts sufficient to constitute a violation of Alabama's criminal anti-publication law. Notwithstanding that the Alabama Supreme Court's decision "did not literally end the case",[88] the Court did not find an absence of requisite finality.[89]

[86]287 So.2d at 87; App. 33.

[87]Tornillo does concede that the case will have been concluded if *The Herald* prevails in this Court. 38 Fla. Supp. 83; App. 14. Only if the Florida Supreme Court's opinion is sustained on constitutional grounds can there be a need to return to the trial court for a determination of factual and state law issues.

[88]384 U.S. at 217.

[89]Although the newspaper editor there agreed to waive constitutional defenses, the Court did not require that waiver as a *sine qua non* to finality. "Indeed, even had appellant been unwilling to concede that he has no defense — apart from the constitutional question — to the charges against him, we would be warranted in reviewing this case. That result follows *a fortiori* from our holdings that where First Amendment rights are jeopardized by a state prosecution which, by its very nature, threatens to deter others from exercising their First Amendment rights, a federal court will take the extraordinary step of enjoining the state prosecution." 384 U.S. at 221 (Mr. Justice Douglas, concurring).

Similarly, in *Hudson Distributors, Inc. v. Eli Lilly & Co.*,[90] the Court reviewed a decision of the Ohio Supreme Court which had upheld the constitutionality of that state's fair trade statute and had remanded the case for further proceedings with respect to issues of fact and state law. Although there remained for adjudication purely state law issues, the Court concluded that the only issue presented to it for determination—the constitutionality of the fair trade act—was "final" within the meaning of Section 1257.

> "The fact that separate and unresolved issues are pending in the Ohio courts and subject to 'further proceedings' therein . . . does not render the judgment of the Ohio Supreme Court on the issue here considered and decided non-final or unappealable. . . ."[91]

This Court has consistently found requisite finality whenever constitutional questions have been conclusively determined at the state level and the remaining non-constitutional issues are unrelated to the issue before the Court. Such results are firmly grounded in the policy underlying Section 1257. The test of finality is intended to facilitate "the smooth working of our federal system,"[92] and to assure that in cases such as this, where no factual or legal questions can affect a definitive determination by this Court, the Court may act without undue delay to protect important federal substantive rights.[93]

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[90]377 U.S. 386 (1964).

[91]377 U.S. at 389, n. 4.

[92]*Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945).

[93]To the same effect, *see Brady v. Maryland*, 373 U.S. 83 (1963) and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

The Court's approach to finality questions has been pragmatic and practical.[94] It has avoided generalizations and wooden results, and has focused instead on such questions as the substantiality of the federal questions involved, the likelihood that delay would seriously affect substantive rights, and the realities of whether controlling federal questions are sufficiently severable from the state law issues which will remain for decision.[95]

Tested against these pragmatic standards, Tornillo's technical claim of jurisdictional incompleteness lacks any plausible foundation. Recycling this case back into the state court system would not affect any issues now presented to the Court for review, and it certainly would not make the constitutional concerns disappear. If this Court does not hear this case, other legislatures may consider enactment of compulsory publication statutes.[96] The highest court in Florida has said that the compulsory publication statute is valid as applied to newspaper publishers. *The Herald* could win or lose its litigation with Tornillo on the facts, or conceivably on other issues of state law, but the statute will have been validated in Florida for all time until this Court changes that result. Thus, the only significant consequence

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[94] *See Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962); Hart & Wechsler, *The Federal Courts and The Federal System*, 628-29 (2nd ed. 1973); Stern & Gressman, *Supreme Court Practice*, 100 (4th ed. 1969).

[95] *E.g.*, *Local No. 438 Construction & General Laborers' Union, AFL-CIO v. Curry*, 371 U.S. 542 (1963); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963).

[96] A United States Senator has recently suggested the Congress consider a federal compulsory publication law if the Florida statute is not voided in this case. 120 Cong. Rec. 1105 (February 4, 1974).

of now finding a lack of finality is to postpone constitutional review for a later day when another case or controversy returns the identical issue to this Court. Not only would this produce "a completely unnecessary waste of time and energy,"[97] but given the "chilling effect" on First Amendment rights, such a result would be intolerable. Aside from criminal prosecutions under the statute which might be attempted, or private actions based on the Florida Supreme Court's analysis of the statute, the press will be operating under a cloud of doubt which can only produce chilling self-censorship.

A failure to act in this case will affect the statewide elections scheduled in Florida this year, where contests will be waged for Governor, United States Senator, and Justices of the Florida Supreme Court. Candidates must soon qualify for these and other elective offices.[98] Whether and to what extent the press elects to cover 1974 candidates and issues may well depend upon what this Court decides in this case.

> "In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. One of the purposes of the Times principle . . . is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amend-

[97] *Mills v. Alabama, supra* at 217.

[98] Sections 99.061 and 100.31, Florida Statutes.

ment freedoms as fear of the outcome of the lawsuit itself. . . . *Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors.* And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is 'hardly less virulent for being privately administered.' "[99]

[99] *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967) (emphasis added).

CONCLUSION

For the reasons given above, and for the reasons stated in the briefs of *amici curiae*, the judgment of the Supreme Court of Florida should be reversed.

Respectfully submitted,

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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,

Appellant,

v.

PAT L. TORNILLO, JR.,

Appellee.

On Appeal from the Supreme Court of Florida

BRIEF FOR RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, AS AMICUS CURIAE

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BRIEF FOR RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, AS AMICUS CURIAE

This brief is filed with the written consent of the parties, pursuant to Rule 42 of the Court.

INTEREST OF AMICUS CURIAE

The Radio Television News Directors Association (RTNDA) is a non-profit professional organization of journalists. It includes approximately 900 members who are active in the supervision, gathering, reporting and editing of news and other information of public affairs broadcast by the national networks and by local radio and television stations throughout the nation.

RTNDA was a principal party in one of the cases which challenged the legality of the Fairness Doctrine which is applied by the Federal Communications Commission to broadcast station licensees. See *Radio Television News Directors Ass'n v. United States*, 400 F.2d 1002 (7th Cir., 1968), *reversed, sub nom. Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). This group of journalists has also expressed its views in the pending FCC inquiry proceeding concerning the Fairness Doctrine (FCC Docket No. 19260).

The case at bar raises the question whether the "fairness" compulsion of Section 104.38 of the Florida Statutes, granting a right of reply to political candidates attacked in newspapers, is constitutional. The journalists of RTNDA have a direct and substantial interest in the result and manner in which this case is decided, as explained further in Argument I of this brief.

SUMMARY OF ARGUMENT

The Appellant's Jurisdictional Statement and the supporting briefs of several amici curiae have already stated a persuasive argument that the Florida right-of-reply statute involved in this case violates the First Amendment. Without undertaking to duplicate those points which rest solidly on traditional free-press constitutional principles, RTNDA wishes to join in support of them. Beyond that, RTNDA believes it important to point out in this brief the growing trend of legal opinion against the constitutionality and usefulness of the Fairness Doctrine in broadcasting, and we urge the Court to reject both the effort to extend the "fairness" rationale to newspapers and the invitation to reaffirm the Fairness Doctrine for broadcasting. In

the *CBS* case last term,[1] the Court recognized as never before the broad journalistic discretion of broadcasters, but the Court incorrectly assumed less governmental interference than actually exists in the FCC's enforcement of the Fairness Doctrine.

ARGUMENT

I. REVERSAL IN THIS CASE, WITHOUT REAFFIRMANCE OF THE CONSTITUTIONALITY OF THE FAIRNESS DOCTRINE, IS IMPORTANT TO THE FREEDOM OF THE ELECTRONIC PRESS.

The present case poses a danger not only to newspapers but to broadcast journalism as well. The danger to the latter is two-fold.

First, an affirmance of the Florida court decision would signal the end of traditional free press theory under the First Amendment. Until now, the print media and the public have continued to receive the benefits of that free press theory, even while the broadcast media have been denied those benefits in important respects. The hope of broadcast journalism has been that it would ultimately convince this Court that *Red Lion*[2] was decided wrongly; obviously, this hope would fade and be replaced by despair for a truly free press if the print media were also subjected to the same or similar "fairness" concepts as those fastened upon broadcasting.

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[1] *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) (hereafter cited as *"CBS"*).

[2] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

Secondly, there is a danger to broadcast journalism in the position taken by some of the amici curiae which filed briefs earlier. They defended newspapers from a right-of-reply obligation on the grounds that such an obligation can be imposed only on broadcasting because broadcasting is "different" and it is that difference which justified the result in *Red Lion*. RTNDA agrees that in *Red Lion* the Court then *believed* that broadcasting is significantly different for these purposes; it does *not* agree with any implication that this is a correct evaluation and one that can continue to be relied upon to distinguish *Red Lion* from cases like the one at bar.

The danger of such a rationale, if it were adopted by this Court, is that it would harden the holding of *Red Lion* even as knowledgeable FCC officials, jurists and other persons in positions to know the workings of the Fairness Doctrine are questioning the constitutionality of the doctrine. Instead, as we support hereinafter, the Court should promote or at least not foreclose the possibility of an early reexamination of government-imposed fairness in broadcasting, by avoiding any reaffirmation of the validity of *Red Lion* in deciding the instant case. In the long run, this approach would be safer for print media also, because if a favorable Court decision here were based on broadcast media "difference" factors which were later recognized by the Court as being irrelevant and/or often present in the case of newspapers and magazines, the print media would presumably be subject to the same kind of governmental fairness regulation as is broadcasting.

For press freedom's sake, this Court should, in reversing the judgment below, refrain from taking what may appear to be the easy way out offered by those who believe they can serve newspaper freedom by writing off the future freedom of broadcasters. This would be especially tragic

in view of the fact that broadcasting is that part of American journalism which public opinion surveys consistently show is most relied upon by the people of this nation.[3]

II. A GROWING RECOGNITION OF THE VALUE OF TRADITIONAL JOURNALISTIC FREEDOM IN BROADCASTING INDICATES THAT THE CONSTITUTIONAL QUESTION ABOUT THE FAIRNESS DOCTRINE SHOULD BE REEXAMINED, AND, THEREFORE, THE RATIONALE FOR THE DOCTRINE SHOULD NEITHER BE EXTENDED TO NEWSPAPERS NOR REAFFIRMED FOR BROADCASTING.

A. Jurists, FCC officials and other persons knowledgeable about the Fairness Doctrine are increasingly questioning its constitutionality.

Less than five years after receiving this Court's unequivocal blessing in the *Red Lion* case, the Fairness Doctrine is in trouble. Leading jurists and present and former FCC officials who once supported the doctrine are raising questions about its constitutionality and usefulness.

In the *CBS* case last term, Mr. Justice Stewart, who had joined in the Court's opinion in *Red Lion*, associated himself with Mr. Justice Douglas' strong views to the contrary of *Red Lion* and then stated in his own concurring opinion:

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[3] See, *e.g.*, "What People Think of Television and Other Mass Media 1959-1972" (The Roper Organization, Inc., 1973).

> "The First Amendment prohibits the Government from imposing controls upon the press. Private broadcasters are surely part of the press."[4]

Justice Stewart concluded:

> "Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that 'fairness' was far too fragile to be left for a government bureaucracy to accomplish. History has many times confirmed the wisdom of their choice.
>
> "This Court was persuaded in *Red Lion* to accept the Commission's view that a so-called Fairness Doctrine was required by the unique electronic limitations of broadcasting, at least in the then-existing state of the art. Rightly or wrongly, we there decided that broadcasters' First Amendment rights were 'abridgeable.' But surely this does not mean that those rights are nonexistent. And even if all else were in equipoise, and the decision of the issue before us were finally to rest upon First Amendment 'values' alone, I could not agree with the Court of Appeals. For if those 'values' mean anything, they should mean at least this. If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters, or imposed

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[4] 412 U.S. at 132-33.

by bureaucratic fiat, the choice must be for freedom."[5]

Justice Douglas stated in his concurring opinion in *CBS*:

> "We have . . . witnessed a slow encroachment by government over that segment of the press that is represented by TV and radio licensees. Licensing is necessary for engineering reasons; the spectrum is limited and wavelengths must be assigned to avoid stations interfering with each other. *** The Commission has a duty to encourage a multitude of voices but only in a limited way, *viz:* by preventing monopolistic practices and by promoting technological developments that will open up new channels. But censorship or editing or the screening by government of what licensees may broadcast goes against the grain of the First Amendment.
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> * * * * *
>
> "[T]he regime of federal supervision under the Fairness Doctrine is contrary to our constitutional mandate and makes the broadcast licensee an easy victim of political pressures and reduces him to a timid and submissive segment of the press whose measure of the public interest will now be echoes of the dominant political voice that emerges after every election. The affair with freedom of which we have been proud will now bear only a faint likeness of our former robust days."[6]

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[5] *Id.* at 145-46.

[6] *Id.* at 157-58, 164-65 (footnotes omitted).

While speaking approvingly of the Fairness Doctrine, the majority opinion in *CBS* recognized as never before the importance of a broad journalistic discretion exercised by broadcasters. Mr. Chief Justice Burger wrote:

> "For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors – newspaper or broadcast – can and do abuse this power is beyond doubt, but that is not reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility – and civility – on the part of those who exercise the guaranteed freedoms of expression."[7]

Chief Judge Bazelon has raised the questions "whether time and technology have so eroded the necessity for governmental imposition of fairness obligations that the doctrine has come to defeat its purposes in a variety of circumstances" and "whether an alternative does not suggest itself – whether, as with printed press, more freedom of the individual broadcaster would enhance, rather than retard, the public's right to a marketplace of ideas."[8]

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[7] *Id.* at 124-25.

[8] *Brandywine-Main Line Radio, Inc. v. FCC*, 153 U.S.App.D.C. 305, 369, 473 F.2d 16, 80 (1972) (dissenting opinion), *cert. denied*, 412 U.S. 922 (1973). The Supreme Court observed in the *CBS* case, 412 U.S. at 102, that because the broadcast industry is dynamic,

(continued)

Judge Bazelon devoted most of his long opinion in *Brandywine* to questioning the assumptions of the Fairness Doctrine. He stated in part:

> "Our perception of the need for broadcasting regulation has not, in Judge Tamm's words, 'seriously been questioned in over fifty years.' A re-examination of the value, purposes and effects of the fairness doctrine raises for me such serious doubts about the constitutionality of its application here that I am compelled to withhold my affirmance.
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> * * * * *
>
> "[W]e are told today, by highly respected members of the newspaper and broadcasting corps, that governmental regulation of broadcasting has been more pernicious than any group of private censors. Some of the 'chilling' effects of the threat of FCC intervention, which the broadcasters say have operated to suppress discussion of controversial views and ambitious journalism, remain hidden from the public eye. *Red Lion* dismissed this issue as speculative, but this cannot be the final word. Facts can change, and so can our perception of them.

(footnote continued)

"solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." See also, *Id.* at 118:

> "To perform its statutory duties, the Commission must oversee without censoring. This suggests something of the difficulty and delicacy of administering the Communications Act – a function calling for flexibility and the capacity to adjust and readjust the regulatory mechanism to meet changing problems and needs."

"Some chilling effects have become quite obvious. In the past years, networks have come under repeated attacks from government spokesmen who did not like the way television reported a variety of hot public issues. These attacks did not focus on inaccuracies, but on the 'bias' or lack of 'fairness' in the presentation. The history of the FCC is itself replete with examples, including *Brandywine* itself, of the controversial viewpoint being screened out in favor of the dreary blandness of a more acceptable opinion. In the context of broadcasting today, our democratic reliance on a truly informed American public is threatened if the overall effect of the fairness doctrine is the very censorship of controversy which it was promulgated to overcome.

* * * * *

"There is no doubt about the unique impact of radio and television. But this fact alone does not justify governmental regulation. In fact, quite the contrary. We should recall that the printed press was the only medium of mass communication in the early days of the Republic – and yet this did not deter our predecessors from passing the First Amendment to prohibit abridgment of its freedoms. If, as has been suggested, we are to focus on the newly acquired role of broadcasting as the 20th century version of the 18th century town meeting or political pamphlet, we must be all the more careful to preserve a 'free press' in the broadcast media. To argue that a more effective press requires a more regulated

> press flies in the face of what history has taught us about the values and purposes of protecting the individual's freedom of speech."[9]

FCC Chairman Dean Burch has had his own doubts about the Fairness Doctrine. In a speech analyzing the opinions of the Court in the *CBS* case, Chairman Burch questioned the "scarcity" rationale for broadcast regulation:

> "***Very candidly, it makes me nervous. (In the final paragraphs of his opinion, it seems to make the Chief Justice a bit nervous too. He speaks of *not* freezing a 'necessarily dynamic process into a constitutional holding' and he refers to the 'advent of cable television' with its potential for greater diversity of competing voices.) There may be very real distinctions to be made between electronic and print journalism in terms of impact and immediacy, but this has nothing to do with 'scarcity'. And neither do the numbers involved – daily newspapers vs. broadcast outlets. I am not quite prepared to rewrite the book, and I have no power to rewrite the Act – but I confess to a growing perplexity about

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[9] 473 F.2d at 64, 77-79 (dissenting opinion) (footnotes, including statements of newsmen, omitted). In this brief we do not directly rely upon statements of newsmen concerning the inhibiting effects of the Fairness Doctrine; this is to avoid any suggestion that any of the opinions quoted here are self-serving or repetitive of the statements made at the time of *Red Lion*. Of course, it is highly pertinent to the theme of the brief that judges, FCC officials, and other legal thinkers have now been persuaded or alarmed by the newsmen's arguments.

> the foundations of the Fairness Doctrine and its role in the regulatory scheme.
>
> "If I had to pick out those lines of *BEM [CBS]* that impress me most, I'd opt for Mr. Justice Stewart's discussion of 'the dangers that beset us when we lose sight of the First Amendment itself, and march forth in blind pursuit of its 'values'."***[10]

Mr. Burch then went on to quote all of that part of Justice Stewart's opinion which is quoted above (pp. 6-7) in this brief. The Chairman closed by stating, "If there's a message in my choice of this closing quotation, I'll leave that for each of you to figure out."[11]

The General Counsel of the FCC, John W. Pettit, has also raised

> ". . . the question of whether the historic justification for the extensive regulation of broadcasting really holds water any more. And more specifically, does the high degree of regulation we impose on radio and TV in comparison with the relative absence of control enjoyed by newspapers and magazines, amount to anything less than invidious discrimination, devoid of any rational basis save the occasional blessing of a Supreme Court majority?

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[10] Remarks of FCC Chairman Dean Burch before the Federal Communications Bar Association, Washington, D.C., June 29, 1973 (FCC News release mimeo. 04297), pp. 4-5.

[11] *Id.* at 6.

* * * * *

"In view of all this, can we or should we continue to cite the scarcity of broadcast frequencies as justifying the differences in regulatory treatment of electronic and print media, especially when broadcast outlets far outnumber newspapers? And if regulation of broadcasting must be justified as a result of its 'impact' or its 'effect' – as Judge Wright suggests – aren't we coming dangerously close to suggesting that government regulation of speech is particularly warranted when the mode of speech is especially effective? And isn't *that* coming dangerously close to suggesting that free speech for broadcasters can only be allowed if they reject the bold and embrace the bland?***

* * * * *

"How, for example, does the Fairness Doctrine stand without the support of the scarcity rationale? If neither electronic nor print media are really scarce in most parts of the country, why do we care what any given station or newspaper broadcasts or prints? And how can we logically or legally support the idea of a Fairness Doctrine? You heard the answer the Florida court gave. In effect it put the government in the role of guarantor of 'robust and wide-open dissemination of ideas and counterthought.' In other words, in the Florida court's view, the right to *receive information* is paramount, and the best way to assure that this information is diverse and accurate is to insure that

> those who disagree receive a chance to respond. If that's really what the First Amendment means, then the idea of scarcity as a prop is hardly needed. But I'm not so sure that's what the First Amendment is all about, nor am I sure that the First Amendment is fulfilled by saddling the print media with regulatory requirements similar to those fixed upon broadcasters. As a matter of fact, that's precisely the wrong way to redress the existing inequalities in treatment of broadcasters and our friends in the print media. ***"[12]

Henry Geller, a former FCC General Counsel who advised the Commission at the time that it was defending the Fairness Doctrine in the *Red Lion* case, has just argued in an amicus curiae brief that, in its present form, "the FCC's fairness practice violates the statute and the First Amendment."[13] In recent months, two former FCC Chairmen, Paul Porter[14] and E. William Henry,[15] as well

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[12] Remarks of FCC General Counsel John W. Pettit before a Regional Conference of the National Association of Broadcasters, Hartford, Conn., Oct. 16, 1973 (unpublished mimeo.), pp. 3-4, 12-13, 15-16.

[13] Brief Amicus Curiae of Henry Geller, p. 2, *et seq.*, filed Feb. 15, 1974, in *National Broadcasting Co. v. FCC*, D.C. Cir. No. 73-2256, on pet. for review of *Accuracy in Media, Inc.*, FCC 73-1232, released Dec. 3. 1973; FCC 74-57, released Jan. 23, 1974. See also, notes 23, 25, 26 *infra*.

[14] See *Broadcasting* magazine, July 9, 1973, p. 19, col. 2.

[15] See *Id*, Feb. 5, 1973, p. 40, col. 2.

as Sam Ervin, Chairman of the U.S. Senate Judiciary Subcommittee on Constitutional Rights,[16] have challenged or seriously questioned the assumptions underlying the Fairness Doctrine. Circuit Judge J. Skelly Wright is quoted as favoring a cautious approach to the Fairness Doctrine in view of newsmen's claims of the "chilling" effects of government regulation.[17] And a majority of 60 or so conferees – academicians, lawyers, judges, journalists, "public interest" representatives and others – passed resolutions last summer calling for restrictions on government regulation of radio and television programming; "The Conferees placed particular emphasis on the evolved form and substance of the 'Fairness Doctrine' . . . as a serious infringement on freedom of expression under the First Amendment."[18]

While this is by no means an exhaustive review of informed criticism of the Fairness Doctrine, it should be sufficient, we believe, to convince the Court to avoid an unnecessary reaffirmation of the doctrine for broadcasting, as well as an extension of "fairness" theory to newspapers. The Florida statute may be invalidated solely on traditional First Amendment grounds, as argued in other briefs filed in this case. RTNDA also urges the Court to leave the way open in its opinion for an early reexamination of the Fairness Doctrine as applied to broadcasting.

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16 119 Cong. Rec. S 20358-62 (daily ed., Nov. 14, 1973).

17 See *Broadcasting* magazine, July 9, 1973, p. 18, col. 3.

18 "The First Amendment and the News Media," Final Report, Annual Chief Justice Earl Warren Conference on Advocacy in the United States, June 8-9, 1973, Cambridge, Mass. (Sponsored by the Roscoe Pound – American Trial Lawyers Foundation), especially at 21-29.

B. This Court has incorrectly assumed that under the Fairness Doctrine there is less governmental interference in the broadcasters' exercise of journalistic discretion than actually exists.

Another reason that the Court should avoid reaffirming the validity of the Fairness Doctrine in dicta here is because the Court, in favoring the doctrine in the *CBS* case, was apparently unaware of the extent of the FCC's interference in the journalistic decisions of broadcasters.

In *CBS*, the Court stated:

> "By minimizing the difficult problems involved in implementing such a right of access [for paid editorial advertisements], the Court of Appeals failed to come to grips with another problem of critical importance to broadcast regulation and the First Amendment – the risk of an enlargement of government control over the content of broadcast discussion of public issues.***
>
> * * * * *
>
> "Under a constitutionally commanded and government supervised right-of-access system urged by respondents and mandated by the Court of Appeals, the Commission would be required to oversee far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint *and whether a particular viewpoint has already been sufficiently aired.* Regimenting broadcasters is too radical a therapy for the ailment respondents complain of.

> "Under the Fairness Doctrine the Commission's responsibility is to judge whether a licensee's *overall performance* indicates a sustained good faith effort to meet the public interest in being fully and fairly informed. The Commission's responsibilities under a right-of-access system would tend to draw it into a continuing *case-by-case determination* of who should be heard and when.***"[19]

Three justices stated that, "it would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the *day-to-day editorial decisions* of broadcast licensees are subject to the kind of restraints urged by respondents.*** Every licensee is already held accountable for the *totality of its performance of public interest obligations.*"[20]

From these and other passages in the opinion of the Chief Justice, it appears that the Court underestimates the degree of case-by-case influence the FCC has upon broadcast licensees in the application of the Fairness Doctrine. The Court is wrong in its emphasis that "[l]icense renewal proceedings, in which the listening public can be heard, are a principal means of such regulation."[21] The principal device of such regulation is case-by-case determination, usually of "whether a particular viewpoint has already been

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[19] *Id.* at 126-27 (emphasis added).

[20] *Id.* at 120-21 (Burger, C.J., joined by Stewart and Rehnquist, JJ.) (emphasis added).

[21] *Id.* at 110.

sufficiently aired." The process starts with a complaint informally considered by a Commission staff employee and may end with full Commission action and perhaps judicial review.[22]

Under this system, many broadcast stations, particularly those with limited financial resources, do not always adhere to their own journalistic judgments in the face of actual or potential complaints to the Commission.[23] Relatively few cases on the application of the Fairness Doctrine reach either the Commission or court, because the station capitulates or compromises at one stage or another of a complaint, perhaps avoiding a foreseeable controversy by "balancing" more – even into blandness – or perhaps by saying nothing at all on an issue. Further, in a close case, a broadcaster may decide to follow the agency's advice, given usually by a Fairness Doctrine "expert" on the FCC staff who is often deferred to by stations and their attorneys.

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22 See, *e.g.*, *NBC* case cited in note 13, *supra*.

23 See the case history of a station which did spend the large sums of money necessary to clear itself of charges of unfairness. Geller, *The Fairness Doctrine in Broadcasting: Problems and Suggested Courses of Action* (Rand Corp. report R-1412-FF, Dec. 1973), pp. 40-42. Geller concludes:

> "Thus the fact that KREM-TV was absolved of all charges does not obviate a significant question: Is the FCC's manner of proceeding, while in good faith in light of substantial issues, nevertheless discouraging the presentation of programming on controversial issues?"

When a complaint is litigated, the agency staff may conduct a "stop-watch" analysis of program content.[24] When the staff review results in an order that more broadcast time be devoted to a contrasting viewpoint, the station will find it tempting and relatively easier to provide the air time, rather than litigate further, no matter how firmly convinced of the reasonableness of its own decision to the contrary. In some cases, because of the imminence of legislative or other action on a controversial issue or election, the Commission will order "prompt compliance" without opportunity for judicial review.[25]

From this it should *not* be inferred that RTNDA would favor adoption of a procedure, as proposed by one former FCC official, which would defer adjudication of fairness

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[24] See, *e.g.*, *Wilderness Society*, 31 F.C.C.2d 729 (1971). In that case, the Commission also demonstrated its willingness to overturn a licensee's judgment on fairness when to do so it had to engage in "a difficult balancing of substantial arguments on both sides" of whether there has been compliance with the Fairness Doctrine. *Id.* at 732. Chairman Burch has stated elsewhere:

> "[T]he letter and spirit of the Fairness Doctrine notwithstanding, there is always the real temptation to cross the line that separates reasonable oversight from outright control – and the mere possibility exerts an influence on both broadcasters and their critics."

Remarks of FCC Chairman Dean Burch, Before the New Orleans Chamber of Commerce, October 5, 1973 (FCC News release, mimeo. 08365), pp. 3-4.

[25] This was the situation in the recent *NBC* case, note 13, *supra*, but on February 14, 1974, the Court of Appeals ordered a stay of that FCC order. The Court heard oral argument on the merits on February 21, 1974, when lawyers and judges delved into the fine points of an award-winning investigative documentary program by NBC. See Geller, *op. cit. supra* note 23, at 38-40.

complaints until consideration of license renewal applications.[26] That procedure without more – preliminary rulings using a much more permissive "reasonableness" standard than articulated and followed thus far – would probably create greater uncertainty and inhibitions in broadcasters than the present system under which the Commission can usually be appeased by prompt rectification or a statutory forfeiture.[27] The foregoing discussion suggests that there may be no way, short of invalidation of the Fairness Doctrine, for the Court to protect "the role of the licensee as a journalistic 'free agent'" who is "only broadly accountable to public interest standards."[28]

Thus, with the problems of the Fairness Doctrine in mind, the Court should refrain from reaffirming it and should be all the more reluctant to extend its theory to the newspaper field.

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[26] Geller, *op. cit. supra* note 23, at 47-53. Moreover, as recognized by Mr. Geller, such a procedure could not be followed with respect to the Personal Attack and Political Editorializing rules, FCC Rules and Regulations, 47 C.F.R. §§73.123, 73.300, 73.598, 73.679. It should be noted that these rules are analogous to the Florida right-of-reply statute at bar, which also would require case-by-case intrusions of government to decide the merits of demands for reply space.

[27] For a case in which license renewal was denied partly on Fairness Doctrine grounds, see *Brandywine-Main Line Radio, Inc.*, 24 F.C.C.2d 18 (1970), 27 F.C.C.2d 565 (1971), *aff'd*, 153 U.S. App.D.C. 305, 475 F.2d 16 (1972), *cert. denied*, 412 U.S. 922 (1973).

[28] *CBS*, 412 U.S. at 117, 120 (Burger, C.J., joined by Stewart and Rehnquist, JJ.).

CONCLUSION

The judgment of the Florida Supreme Court should be reversed, because it and the Florida right-of-reply statute abridge the freedom of the press. This Court should also recognize, with a view toward its own early reexamination of the issue, that the constitutionality of the Fairness Doctrine is being questioned by some of its most knowledgeable former supporters and that there is other evidence that the FCC's enforcement of fairness in broadcast journalism violates the First Amendment.

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February 1974

FILED
FEB 28 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of
KNIGHT NEWSPAPERS, INC.,
Appellant,

v.

PAT L. TORNILLO, JR.,
Appellee.

On Appeal from the Supreme Court of Florida

~~MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND~~ BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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IN THE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters (hereinafter NAB) moves pursuant to Rule 42 of this Court for leave to file a brief *amicus curiae* in the above entitled proceeding. NAB has received written permission to file such a brief from both parties to this case.

NAB is a non-profit association of radio and television broadcast stations and networks. As of February 20, 1974, NAB's membership included 2,366 AM radio stations, 1,473 FM radio stations, 529 television stations and all nationwide commercial

broadcast networks. The objective of the NAB, according to its by-laws:

> . . . shall be to foster and promote the development of the arts of aural and visual broadcasting in all its forms; to protect its members in every lawful and proper manner from injustices and unjust exactions; to do all things necessary and proper to encourage and promote customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public.

All communications media share a common interest in the presence of substantial threats to the unfettered exercise of freedom of the press. The Florida statute in question in this case presents such an assault, for in the name of "fairness" it represents a severe restraint upon the exercise of journalistic editorial discretion by newspaper publishers. Thus, in keeping with the above-stated objectives, the NAB herein seeks to protect its members from the potential ramifications and "chilling effect" of government encroachments upon the press.

NAB respectfully submits that in addition to its mutual interests with newspapers in this case, the broadcaster has other concerns in the outcome of this matter which would not be adequately represented by Appellant. In particular, the broadcast media are now beset with an administratively conceived and judicially supported fairness doctrine. It is likely that some discussion of this doctrine will emerge in the course of this proceeding.[1] Thus, NAB is concerned that in determining the rights of newspapers and the constitutionality of the Florida "right to reply" statute, the

[1] *See, e.g.*, Appellant's Jurisdictional Statement at 20-27.

theoretical grounds upon which the fairness doctrine is based will come into issue.[2] NAB is of the opinion that judicial comments at this time will affect significantly the interests of commercial broadcasters to the extent that such comments may affect the fairness doctrine.

WHEREFORE, in view of the significance of this matter, the NAB respectfully requests that it be granted leave to file the annexed brief *amicus curiae* in the above entitled proceeding.

Respectfully submitted,

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[2] The continued validity of the doctrine may be in question, *see, e.g.*, Columbia Broadcasting Sys., Inc. v. Democratic Nat'l. Comm., 412 U.S. 94, 148-70 (1973) (Douglas, J., concurring).

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Appellee.

On Appeal from the Supreme Court of Florida

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF BROADCASTERS

INTEREST OF *AMICUS*

The National Association of Broadcasters (hereinafter NAB) submits this brief *amicus curiae* in support of the Appellant herein. The interest of *amicus* NAB has been stated in full in the accompanying *Motion for Leave to File Brief Amicus Curiae.*

PRELIMINARY STATEMENT

NAB adopts the Statement of the Case as set forth in Appellant's Jurisdictional Statement at pages 5-7

NAB submits that the Florida "right to reply" statute, Section 104.38, which requires newspapers to publish, without charge, replies of political candidates whom they criticized during election campaigns, does violate freedom of the press as guaranteed by the First Amendment. Thus, NAB respectfully urges this Court to reverse the decision of the Supreme Court of Florida and thereby eradicate the severe restraints upon the exercise of journalistic discretion and its abridgement of a free press as imposed by the constitutionally infirm "right of reply" statute. In its review of the Florida statute, however, NAB urges the Court to render its decision within the confines of the First Amendment, without effecting further solidification of its 1969 decision in *Red Lion Broadcasting Co. v. F.C.C.*[1] wherein it established the constitutionality of the so-called fairness doctrine as applied to broadcast licensees by the Federal Communications Commission (FCC). *Red Lion* has come under increasing question and if it is to be revisited, it should be in a case involving application of the fairness doctrine to a broadcast station — not in a case involving the constitutional validity of a state statute encroaching upon the First Amendment rights of a newspaper.

ARGUMENT

I. IMPOSITION OF A RIGHT OF REPLY STATUTE FOR POLITICAL CANDIDATES IMPAIRS THE EXERCISE OF FIRST AMENDMENT RIGHTS BY IMPOSING A PRIOR RESTRAINT UPON THE PRESS.

By its decision, the Supreme Court of Florida would have us forsake the First Amendment in order to preserve the

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[1] 395 U.S. 367 (1969).

values it represents. Thus, it describes the "right of reply" statute as:

> . . . in the interest of all the people, provides that candidates for public office under certain prescribed circumstances shall have a right of reply, a right of expression. It does not deny to the owner of the instruments of the newspaper industry any right of expression. The statute *assures*, and *does not abridge*, the right of expression which the First Amendment guarantees.[2]

Even such "assurances," if the Florida statute be viewed as such, are, nevertheless, circumspect under the scope of the First Amendment:

> "In our early history one view was that the publisher must open his columns 'to any and all controversialists, especially if paid for it.' " Mott, American Journalism, 55 (1962) [quoting Benjamin Franklin].
>
> "Franklin disagreed, declaring that his newspaper was not a stagecoach, with seats for everyone; he offered to print pamphlets for private distribution, but refused to fill his paper with private altercations." *Ibid.* (citation omitted).[3]

And that philosophy, according to Justice Douglas, "became implicit in the First Amendment."[4] An affirmative

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[2] Tornillo v. The Miami Herald Publishing Co., 38 Fla. Supp. 80 (1973) as reproduced in Appellant's Jurisdictional Statement at app. A 18.

[3] Columbia Broadcasting Sys., Inc. v. Democratic Nat'l. Comm., 412 U.S. 94, 152 (1973) (Douglas, J., concurring).

[4] *Id.*

requirement may still constitute a form of censorship and, more importantly, it may impose a "chilling effect" upon the free exercise of First Amendment rights.[5] Consequently, even an affirmative requirement must overcome the heavy presumption against its constitutional validity, the same as would any system of prior restraint of activities protected by the First Amendment.[6] *New York Times Co. v. United States,* 403 U.S. 713, 714 (1971); accord, *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971), *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963), *Near v. Minnesota,* 283 U.S. 697 (1931).

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[5] In Columbia Broadcasting, *supra,* Justice Douglas, in a footnote reference, stated:

> The monetary and other burdens imposed on the press by the rights of a criticized person to reply, like the traditional damage remedy for libel, lead of course to self-censorship respecting matters of importance to the public that the First Amendment denies the Government the power to impose. The burdens certainly are as onerous as the indirect restrictions on First Amendment rights which we have struck down . . . . In each instance we held the restriction unconstitutional on the ground that it discouraged or chilled constitutionally protected rights of speech, press or association.

Id. at 168, note 18 (Douglas, J., dissenting).

[6] Quoting Near v. Minnesota, 283 U.S. 697, 719-20 (1931), the Court in New York Times Co. v. United States, 403 U.S. 713, 723 (1971) stated:

> "The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct."

In *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973), this Court held that there is no right to access to the airwaves which would require broadcasters to accept paid editorial announcements. Similarly, in *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971), the court held that a newspaper could not be compelled to accept and print advertising in the exact form submitted. Yet another alleged right of access was denied in *Avins v. Rutgers, State University of New Jersey*, 385 F.2d 151 (3rd Cir. 1967), as the court upheld the refusal of law review editors to accept a proffered article. These cases demonstrate that the imposition of an affirmative duty upon freedom of the press is not likely to be constitutionally valid.

It remains to be determined whether the Florida "right of reply" statute is capable of overcoming the presumption against its constitutional validity. NAB suggests that it cannot. As discussed in Appellant's Jurisdictional Statement at 16-20, there are few clear objectives of the statute. One raises the issue of a state's interest in fair elections. This Court in *Mills v. Alabama*, 384 U.S. 214 (1966), noted that:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes . . . . Suppression

> of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free. *Id.* at 218-19.

Thus, the Court invalidated a state criminal statute prohibiting the solicitation of votes on election day.

Another purported objective of the Florida statute is to counter alleged media concentration and monopolization.[7] Justice Douglas noted, in *Columbia Broadcasting, supra,* that:

> Of course there is private censorship in the newspaper field. But for one publisher who may suppress a fact, there are many who will print it. But if the government is the censor, administrative *fiat* not freedom of choice carries the day. *Id.* at 153 (Douglas, J., concurring).

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[7] *But see* statement by Thomas I. Emerson, a leading First Amendment scholar:

> " . . . any effort to solve the broader problems of a monopoly press by forcing newspapers to cover all 'newsworthy' events and print all viewpoints, under the watchful eyes of petty public officials, is likely to undermine such independence as the press now shows without achieving any real diversity." The System of Freedom of Expression (1970), p. 671.

Columbia Broadcasting, *supra* at 151 (Douglas, J., concurring).

Similarly, Justice Stewart noted that:

> Even though it would be in the public interest for the respondents' advertisements to be heard, it does not follow that the public interest requires *every* broadcaster to broadcast them. And it certainly does not follow that the public interest would be served by *forcing* every broadcaster to accept any particular kind of advertising. *Id.* at 144 (Stewart, J., concurring).

NAB respectfully suggests that the precedents clearly mandate the invalidation of the Florida statute as an unjustifiable encroachment upon the exercise of fundamental First Amendment rights.[8]

II. THE FLORIDA STATUTE IS CONSTITUTIONALLY INFIRM AND THE COURT NEED NOT AND SHOULD NOT BASE ITS RULING ON A REVISITATION OF ITS *RED LION* DECISION.

Implicit in the Appellant's arguments before the Court, as evidenced in its Jurisdictional Statement, is a call for

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8 What kind of First Amendment would best serve our needs as we approach the 21st century may be an open question. But the old fashioned First Amendment that we have is the Court's only guideline; and one hard and fast principle which it announces is that government shall keep its hands off the press.

Columbia Broadcasting, *supra* at 160 (Douglas, J., concurring).

the reaffirmation of *Red Lion* with its distinctions among the various communications media in terms of First Amendment protections.[9] NAB submits that this is not the appropriate factual situation for revisiting that decision.

In the first place, the Florida statute here under review should be interpreted within the narrow confines of the First Amendment. As previously discussed, restraints upon the free exercise of First Amendment rights bear a heavy presumption against their constitutional validity. Those which fail to assert a compelling interest capable of overcoming that presumption are simply void.

A second reason for not revisiting *Red Lion* is that the case before the Court involves newspapers and not the broadcast media. Reliance upon that holding in this case would serve to solidify *Red Lion* in the face of a definite trend away from its holdings. If *Red Lion* is to be revisited, it should be within the perspective of a set of facts applicable to broadcasting and the fairness doctrine.

This Court noted in *Red Lion* that:

> There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy

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[9] Red Lion, *supra* at 386.

> Although broadcasting is clearly a medium affected by a First Amendment interest, (citation omitted) differences in the characteristics of news media justify differences in the First Amendment standards applied to them. (footnote and citation omitted).

Id.

> or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves. *Red Lion, supra* at 389.

Despite attempts by some to interpret this language in its broadest sense, this Court, in *Columbia Broadcasting*, rejected the claim that individuals and groups had a right to purchase advertising time to comment on public issues:

> The licensee policy challenged in this case is ultimately related to the journalistic role of a licensee for which it has been given initial and primary responsibility by Congress. The licensee's policy against accepting editorial advertising cannot be examined as an abstract proposition, but must be viewed in the context of its journalistic role. *Columbia Broadcasting, supra* at 118 (Burger, C.J.)
>
> . . . .
>
> More important, as we have noted, Congress has affirmatively indicated in the Communications Act that certain journalistic decisions are for the licensee, subject only to the restrictions imposed by evaluation of its overall performance under the public interest standard. *Id.* at 120.
>
> . . . .
>
> More profoundly, it would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind

> of restraints urged by respondents. To do so in the name of the First Amendment would be a contradiction. *Id.* at 120-121.

Thus, it seems apparent that the possible scope of the *Red Lion* decision has been limited by *Columbia Broadcasting*. Accordingly, any reliance upon *Red Lion* in determining the rights of the parties in the instant case would necessitate a step backwards in solidifying a decision which has since become subject to some modification. As was noted by Justice Stewart:

> *This Court was persuaded* in *Red Lion* to accept the Commission's view that a so-called Fairness Doctrine was required by the unique electronic limitations of broadcasting, at least in the then-existing state of the art. *Rightly or wrongly*, we there decided that broadcasters' First Amendment rights were "abridgeable." But surely this does not mean that those rights are nonexistent. And even if all else where in equipoise, and the decision of the issue before us were finally to rest upon First Amendment "values" alone, I could not agree with the Court of Appeals. For if those "values" mean anything, they should mean at least this: *If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be for freedom. Columbia Broadcasting, supra* at 146 (emphasis added). (Stewart, J., concurring).

NAB further opposes a revisiting of *Red Lion* at this time because it is apparent that the fairness doctrine, as embodied in that case, is likely to come under scrutiny

in the future. Justice Douglas, for one, has stated with respect to *Red Lion* that:

> I did not participate in that decision and, with all respect, would not support it. The Fairness Doctrine has no place in our First Amendment regime. *Columbia Broadcasting, supra* at 154 (Douglas, J., concurring).

In *Brandywine-Main Line Radio, Inc. v. F.C.C.*,[10] Chief Judge Bazelon, in his dissenting opinion, questioned not only the application of the fairness doctrine to station WXUR, but also challenged certain of the precepts upon which the doctrine is founded. Thus, he stated that:

> . . . abridgement of individual rights may be tolerated only when in the long run it enhances the right of the public to receive access to the marketplace of diverse views. Obviously this requires a delicate balancing: any harm to private rights must be outweighed by benefit to the public. (footnote omitted). *Id.* at 66 (Bazelon, C. J., dissenting).

In considering the WXUR matter he noted that the imposition of the fairness doctrine did not serve to enhance access to the marketplace of diverse views:

> WXUR was no doubt devoted to a particular religious and political philosophy; but it was also a radio station devoted to speaking out and stirring debate on controversial issues. (footnote om.) The station was purchased by Faith Theological Seminary

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[10] 473 F.2d 16 (D.C. Cir. 1972).

> to propogate a viewpoint which was not being heard in the greater Philadelphia area. The record is clear that through its interview and call-in shows it *did* offer a variety of opinions on a broad range of public issues; and that it never refused to lend its broadcast facilities to spokesmen of conflicting viewpoints. (footnote om.).
>
> The Commission's strict rendering of fairness requirements, as developed in its decision, (footnote om.) has removed WXUR from the air. This has deprived the listening public not only of a viewpoint but also of robust debate on innumerable controversial issues. It is beyond dispute that the public has *lost* access to information and ideas. *Id.* at 69 (Bazelon, C.J., dissenting).

Recognizing that the fairness doctrine is premised upon the scarcity of frequencies concept,[11] Judge Bazelon suggested that the time was ripe for a thorough review of the doctrine in light of the current state of broadcast technology:

> Whether in this case the Commission has simply taken the doctrine too far or applied it too rigidly, or whether the trouble lies deeper, cannot be determined without a remand. . . . Do fairness policies truly promote a marketplace of uninhibited, wide and robust debate? (footnote om.) It is

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[11] Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.

Red Lion, supra at 389.

> proper that this court urge the Commission to reconsider this case in light of its fairness hearings; that we encourage the Commission to draw back and consider whether time and technology have so eroded the necessity for governmental imposition of fairness obligations that the doctrine has come to defeat its purposes in a variety of circumstances; that we ask whether an alternative does not suggest itself — whether, as with printed press, more freedom for the individual broadcaster would enhance, rather than retard, the public's right to a marketplace of ideas. *Id.* at 79-80 (Bazelon, C.J., dissenting).

Moreover, similar concerns have recently been expressed by Senator Sam Ervin, a leading constitutional authority and respected member of the United States Senate. Discussing the same WXUR case, he stated:

> The underlying rationale of the fairness doctrine is that since broadcasting outlets are so scarce, they must be regulated to insure balanced presentations of controversial issues. This is one assumption which can no longer be accepted without challenge. As of March 1973, there were a total of 7,399 radio stations broadcasting in this country. This compares with a total of 1,761 daily newspapers in circulation . . . . Most Americans, wherever they are situated, can receive numerous radio signals, and usually this means they can hear competing views. In Dr. McIntire's case, while WXUR was the sole radio station in Media, Pa., the town was located in the greater Philadelphia

> broadcasting area within the range of a myriad radio signals. . . . It is safe to say that the public in the Philadelphia area had a great variety of "respectable" views to listen to, but only from WXUR could it hear challenges to those views.[12]

As a remedy to this intolerable situation, Senator Ervin suggests that the fairness doctrine be operative only where there is present a scarcity of available radio signals. He would presume scarcity only in a locality served by less than four broadcasting signals or where competing views are in fact not being aired.[13]

The Senator's scheme may never be adopted, but his concern evidences a growing trend both in the courts, in the Congress and in the FCC itself that the fairness doctrine be subjected to further scrutiny. Accordingly, NAB respectfully submits that in light of that apparent trend, the principles of *Red Lion* respecting application of the doctrine to broadcasters should not be further encrusted in precedents set by this Court in the instant case.

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[12] 119 Cong. Rec. (reprint of daily ed. Nov. 14, 1973) at 2.

[13] *Id.* at 3.

CONCLUSION

For the foregoing reasons, NAB respectfully urges the Court to declare the Florida "right of reply" statute unconstitutional as an abridgement of the First Amendment. Moreover, we call upon the Court to so rule without reaffirming its holdings in *Red Lion*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* of the National Association of Broadcasters have been served this day by mail upon each of the following:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY, a Division of Knight Newspapers, Inc., *Appellant*

v.

PAT L. TORNILLO, JR., *Appellee*

On Appeal from the Supreme Court of Florida

BRIEF OF AMICUS CURIAE, THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

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BRIEF OF AMICUS CURIAE, THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

PRELIMINARY STATEMENT

The American Newspaper Publishers Association submits this brief as amicus curiae in support of the Appellant and urges that this Court reverse the decision of the Supreme Court of Florida entered below. The written consents of the Appellant and Appellee to the filing of this brief have been filed with the Clerk of this Court. The American Newspaper Publishers

Association with the consent of the parties also filed a brief amicus curiae in support of Appellant's Jurisdictional Statement.

INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association (hereinafter referred to as "ANPA" or the "Association") is a nonprofit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of 1100 daily newspapers, representing over ninety percent of the total daily and Sunday newspaper circulation in the United States. Although some of the largest newspapers in the country hold membership in the ANPA and although some ANPA member newspapers may have "regional and international"[1] circulation, it should be noted that more than fifty percent of the Association's members have daily newspaper circulation of less than 25,000 and seventy-five percent of the Association members have daily newspaper circulation of less than 50,000. The Miami Herald Publishing Company and twenty-six other newspapers located throughout the State of Florida hold membership in the ANPA.

To the knowledge of your amicus, this case represents the first litigation involving the issue of constitutionality of a state statute requiring a newspaper to publish, free of charge, a response to charges against any candidate for nomination or election. For this reason, the decision below will have major impact, not only upon newspapers in the State of Florida, but also upon newspapers throughout the United States where similar statutes may exist or be enacted. Because of

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[1] Opinion of the Supreme Court of Florida, Appendix to Appellant's Brief, p. 23, 287 So.2d 78.

this impact, your amicus desires to present to this Court its views on behalf of its members in regard to the constitutionality and legality of the State of Florida Statutes, § 104.38.

ARGUMENT

A. This Court Has Jurisdiction Under 28 U.S.C. § 1257 To Review the Decision of the Supreme Court of Florida in This Appeal.

Your amicus supports and adopts the argument of the Appellant in connection with this Court's jurisdiction to review the decision of the Supreme Court of Florida in this matter. It is clear that the decision of the Florida Supreme Court on the constitutionality of § 104.38, Florida Statutes, meets the finality requirement of 28 U.S.C. § 1257.

As recently as December 5, 1973, this Court had occasion to discuss the finality requirement of 28 U.S.C. § 1257 in *North Dakota Pharmacy Board* v. *Snyder's Drug Stores, Inc.*, — U.S. —, 38 L.Ed.2d 379, 94 S.Ct. — (1973). Although that case came before the Court on certiorari under 28 U.S.C. § 1257(3), and the present case involves an appeal under 28 U.S.C. § 1257(2), this is a distinction without a difference as it relates to that statute. In *Snyder's,* the State Supreme Court remanded for a further administrative proceedings after it determined that the state statute involved was constitutional. In that case, this Court was met with the respondent's argument that because of the remand by the state court, the U. S. Supreme Court had no jurisdiction to review the state court decision on the constitutional issues. Relying upon *Mills* v. *Alabama,* 384 U.S. 214 (1966), and *Hudson Distributors, Inc.* v. *Eli Lilly and Co.,* 377 U.S.

386 (1964), this Court found the decision of the North Dakota Supreme Court to be final and appealable. Further, the Court reaffirmed Mr. Justice Frankfurter's point that the concept of finality has a "penumbral area". Here, for all practical purposes, the Florida Supreme Court has finally decided the constitutional issue presented by the Appellant. It held that there was no constitutional barrier preventing the enforcement through civil litigation of the Florida criminal statute dealing with the right of a candidate for office to reply to newspaper columns assailing that candidate's personal character or charging that candidate with malfeasance or misfeasance in office, or otherwise "attacking" that candidate's official record. If this Court denies review at this point, the Appellant, as in *Snyder's,* has no constitutional barrier to the enforcement of § 104.38, of the Florida Statutes. To deny review of this matter on this appeal would "result in a completely unnecessary waste of time and energy in judicial systems already troubled by delay due to congested dockets". *Mills* v. *Alabama, supra,* p. 217-218. Your amicus respectfully suggests that the finality requirement of 28 U.S.C. § 1257 has been satisfied and that the decision of the Supreme Court of Florida on the constitutional issue is ripe for review.

B. Florida Statutes, § 104.38 Is an Unconstitutional Abridgement of the Freedom of the Press.

The Appellee was a candidate for a state office who demanded that the appellant print verbatim his response to two editorials which allegedly attacked the appellee's personal character.

The trial court concluded that the Florida Statutes, § 104.38 was an unconstitutional restraint upon freedom of speech and press. The Florida Supreme Court,

in a decision contrary to the trial court, determined that the statute in question enhanced, rather than abridged, the First and Fourteenth Amendments to the Constitution of the United States.

Your amicus respectfully submits that the Florida statute in question is clearly unconstitutional and that it, permitted to stand, formulates a devastating inroad upon the freedom of the press guaranteed by the First Amendment. Not only does the statute compel a newspaper to print editorial material with which it does not agree, but also it indirectly and subtly must surely have a stifling effect upon a newspaper's editorial freedom when it can be anticipated that a reply of unknown comment to the editorial must be published, free of cost, with equal dignity accorded the original editorial.

The Supreme Court of Florida for the most part erroneously based its opinion upon a case dealing with the electronic media, *Red Lion Broadcasting Co., Inc.* v. *FCC,* 395 U.S. 367 (1969), in which this Court upheld the constitutionality of the FCC "fairness doctrine" and found that it did not violate the First Amendment guarantees of freedom of speech and press. It is clear, however, from a reading of *Red Lion* that this Court did not intend its words to be applied to the private press of this country. The issues and holding in that case relate only to the regulation of the broadcast medium, which is a medium not open to all and one which by the very genesis of its electronic being is subject to governmental control. The problem in *Red Lion* as seen by this Court was a possibility of station owners and a few networks having within their power as private interests the ability to censor the free exchange of information in the broadcast medium. Certainly, no extensive argument is required to con-

vince this Court that *Red Lion* does not constitute precedent for permitting the State of Florida to dictate to a free press when, where and what it will publish in its daily newspapers.

Further, the Court below relied upon this Court's decision in *Associated Press* v. *U.S.*, 326 U.S. 1 (1945), in reaching its decision. Again, its reliance is clearly misplaced. *Associated Press* concerned monopolistic practices and only stands for the proposition that the business of operating a newspaper, like other businesses, is subject to usual business regulation, including regulation under applicable antitrust laws. It appears that the Court below in relying so heavily upon *Red Lion* and *Associated Press* believed that those cases supported its theory that, since daily newspapers and chain newspapers have become so large, they tend to in some way improperly or illegally monopolize the dissemination of news. As this Court can clearly see from the Interest of the Amicus section set out on page two of this brief, the membership statistics of this amicus demonstrate that the lower court's concern with the size and concentration of the press is unfounded. Those statistics show that above all the majority of the members of this amicus are local, community businesses. Not only are the lower court's concerns relating to size and concentration of the press medium unfounded, but also it is submitted that the thrust of this Court's decisions in *Red Lion* and *Associated Press* does not relate to size and concentration of the press, but declares that a free press not only prohibits governmental interference but also prohibits interference with the exercise of a free press by private interests. In other words, private interests cannot conspire to interfere with another's right of freedom of the press.

In this case no one is conspiring, or in any way attempting, to intrude upon or to repress Appellee's exercise of his constitutional guarantee of a free press or his constitutional guarantee to express in any manner his views on political issues. The "right" Appellee is, in fact, asserting is a "right" given to him by the State of Florida under Section 104.38 of its statutes.

Although the Court below indicates that it recognizes that *Red Lion* is perhaps in some way distinguishable as a case dealing with the broadcast medium, the Court below believed that the law as enunciated by this Court concerning regulation of the broadcast medium was clearly applicable to, and controlling on, the print medium. For instance, in its opinion the Court below stated that *Red Lion* was applicable to the facts of the case before it since it could take judicial notice of the fact that publishers of newspapers rely upon the gathering and dissemination of news transmitted over telegraph wire or air waves to and from news-gathering bodies and newspapers. Without further comment on the logic of this reasoning, suffice it to say that your amicus does not contest for a moment that telegraph wires and air waves are subject to regulation and may be regulated. However, this is a function separate and apart from Appellee's exercise of its guarantee of freedom to utilize the medium of the printed word.

It would appear that the Court below has in some way decided that since competition is rapidly vanishing in the business of the publication of daily newspapers and that the trend is toward the concentration of ownership of mass media, including newspapers, the Florida statute in question here is justified because it permits the individual candidate

for office, who does not own or have unlimited access to a daily metropolitan newspaper, a right to express his views on equal terms with that of the large newspaper owner. In other words, the Court below has indicated that the First Amendment guarantee to a free press must somehow be adjusted to eliminate the inequitable disparity in the ability of a large newspaper to publish or exercise its freedom of press and ability of an individual candidate for office to exercise his freedom of the press. This is precisely that type of frightening logic often espoused to the effect that an individual's Fourth Amendment right to be free from an unreasonable search and seizure should be abrogated by the courts when the effect of upholding that right allows a guilty man to go free. In other words, even if the free and fair exercise of constitutional guarantees may result in inequities or injustices, the overall benefit to society must suffer in the long run if this Court does not enforce those guarantees on a uniform and impartial basis.

The Supreme Court of Florida in this case has adopted the untenable position that the press is only one-half free unless others have access to that press to express an opposing view on matters of political and public concern. Similar arguments were rejected in the *Chicago Joint Board, Amal. Cloth. Workers* v. *Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971), wherein a newspaper refused to publish advertisements submitted to it by a union purporting to present the union's view in a labor dispute. The Court of Appeals, in rejecting the union's contentions, stated:

> "The Union's right to free speech does not give it the right to make use of the defendants' printing presses and distribution systems without defendants' consent." 435 F.2d 478.

Similarly, this issue was faced in the case of *Associates & Aldrich Co.* v. *Times Mirror Co.,* 440 F.2d 133 (9th Cir. 1971), wherein the Court stated at p. 135:

> "Appellant has not convinced us that the Courts or any other governmental agency should dictate the contents of a newspaper."

The issue presented in this case is fundamental. The struggle for liberty has historically been a struggle against government. The Founding Fathers in their collective wisdom sought to prevent the curtailment of freedom of religion, press, assembly and speech. "Madison and the other Framers of the First Amendment, able men they were, wrote in language they earnestly believed could never be misunderstood: 'Congress shall make no law . . . abridging the freedom . . . of the press . . .' Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints." *New York Times* v. *United States,* 403 U.S. 713, 716-17 (1971).

As recent as July 13, 1973, the Supreme Judicial Court of Massachusetts issued an opinion concerning proposed legislation in that state which would require a newspaper accepting a paid political advertisement for one group to accept for publication a paid political advertisement advocating a contrary view. The Court in its opinion considered not only the rationale of the so-called "fairness doctrine" upheld in *Red Lion, supra,* but also the proposition that the intent of the statute was to foster the expression of all views in the public interest. The Massachusetts Court concluded

that the statute was unconstitutional and that, paradoxically, a result opposite from the one desired would be achieved. Further, the Court held that combating alleged media concentration would in no way justify the abridgment of First Amendment rights. *Opinion of the Justices,* 298 N.E. 2d 829 (Mass. 1973).

If the legislature can dictate to the press what it must print in the public interest regarding candidates for election, it follows that freedom of expression shall not long be a right retained by the people but a limited privilege exercised under the color of public interest by whoever acts with the authority of government.

Justice Stewart, in a concurring opinion in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* — U.S. —, 36 L.Ed. 2d 772, 807-08 (1973), stated:

> "There is never a paucity of arguments in favor of limiting the freedom of the press. The Court of Appeals concluded that greater government control of press freedom is acceptable here because of the scarcity of frequencies for broadcasting. But there are many more broadcasting stations than there are daily newspapers. And it would require no great ingenuity to argue that newspapers too are Government. After all, newspapers get Government mail subsidies and a limited antitrust immunity. The reasoning of the Court of Appeals would then lead to the conclusion that the First Amendment requires that newspapers too be compelled to open their pages to all comers.
>
> * * * * *

> "Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that 'fairness' was far too fragile to be left for a government bureaucracy to accomplish. History has many times confirmed the wisdom of their choice."

Your amicus is ever mindful of the potential influence of the press and is dedicated to the proposition that a free and open society requires the widest dissemination of all ideas and positions from as many different sources as possible if our society is to remain free. Inherent in a truly free press, however, is the unfettered right to criticize or to advocate. For every publisher who may express a critical view, there are others who will express an opposing view.

It is respectfully submitted that the application of the Florida statute to the Appellant herein presents to this Court the most substantial and clear-cut violation of the constitutional guarantee of a free press that this Court has ever been called upon to review. If the decision of the Florida Court is sustained, freedom of the press as explicitly guaranteed by the Constitution shall soon perish and be replaced by administrative fiat.

CONCLUSION

In conclusion, it is respectfully urged that this Court reverse the decision of the Supreme Court of Florida which upheld the constitutionality of Florida Statutes, § 104.38 and in so doing, reaffirm that the Framers of the First Amendment to the Constitution did not intend that the several states should have the power to

so intimidate persons exercising their First Amendment right to a free press.

Respectfully submitted,

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Appellant,

—v.—

PAT L. TORNILLO, JR.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF FOR NEW YORK NEWS INC., AS *AMICUS CURIAE*

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ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF FOR NEW YORK NEWS INC., AS *AMICUS CURIAE*

I.

Statement

New York News Inc. submits this brief as *amicus curiae,* with the written consent of the parties under Rule 42, to urge reversal of the judgment of the Florida Supreme Court on the ground that Florida Statute 104.38 is an invasion of the freedom of the press protected by the First Amendment.

II.

Interest of the *Amicus*

New York News Inc. publishes the *Daily News* and the *Sunday News* (collectively "The News") in New York City, two newspapers with the largest circulation of any daily or Sunday paper in the United States. The News is one of three daily English-language newspapers published in New York City. A wide choice of news coverage and editorial views is offered by The New York Times, New York Post and The News, as well as the large number of suburban newspapers which circulate widely in the region.

While copies of The News are sold in Florida, it is not considered that these newspapers are within the direct reach of the Florida statute. Nevertheless, a decision upholding the validity of that statute would inevitably lead to far-reaching demands for the enactment of similar laws, even on a federal basis.*

The News' objections to the Florida statute arise from its coercive nature and its criminal sanctions, not from any philosophical rejection of the idea of a balanced presentation of political campaigns and candidates. As a newspaper it considers that it has consistently operated in a manner entirely harmonious with the rather crudely expressed objectives of the Florida statute.** But like most newspapers,

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* Senator McClellan has already publicly called for a national "right to reply" law requiring newspapers to publish the replies of public figures who are criticized in stories or editorials. *Broadcasting*, February 11, 1974, p. 28. Senator Cranston quickly announced his opposition. *Editor & Publisher*, February 16, 1974, p. 12.

** For example, for many years The News has run a "Battle Page" during important election campaigns, in which equal amounts of space were provided to the principal political parties for publication of their own uncensored and unrevised statements.

The News objects strenuously to having any agency of government dictate its content. It is prepared to answer for that content not only in court, where it may be challenged for defamation, contempt of court or other recognized restrictions on complete freedom of publication, but also to its readers, who demand nothing less than a balanced presentation of the news. It is unwilling, however, to accept government-imposed restraints on its own independent editorial judgment.

III.

ARGUMENT

A. *The Historical Foundation of the First Amendment Does Not Support the Florida Supreme Court's Decision.*

1. The First Amendment Was Established as a Restraint on Government, Rather Than as an Affirmative Right Conferred Upon Individuals

During the latter half of the Eighteenth Century, the American Colonists became increasingly aware of the potential restraints which government could impose upon individuals for publishing any criticism of their political rulers. Although the Star Chamber in England had been abolished in 1641, the law of treason was still invoked to restrict liberty of the press. Thayer, *Legal Control of the Press* 10 (1944). The widely publicized trial of John Peter Zenger in 1735 tended to crystallize popular opinion in favor of independence of the press from governmental harassment and interference.

It seems clear that people's fear and distrust of centralized government as a licensor or censor was a leading reason for the adoption and the precise wording of the First

Amendment: "Congress shall make no law . . . abridging the freedom . . . of the press". *Lovell* v. *Griffin*, 303 U.S. 444, 451-452 (1938). Although not absolute of application, the wording of the First Amendment is direct and unequivocal. "It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Bridges* v. *California*, 314 U.S. 252, 263 (1941). In exalting the role of the press by clothing it with special protection distinct from freedom of speech, James Madison, the midwife of the First Amendment, proclaimed:

> " 'Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the states, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness?' "

Quoted in *Near* v. *Minnesota*, 283 U.S. 697, 718 (1931).

The framers of the First Amendment recognized the possibility of abuses by the press, but affirmatively decided that the press must be free to publish what it deemed to be

in the interest of the people as a check on governmental abuse of power. Certainly, there is no hint that the founding fathers considered that "liberty of the press" encompassed a right of government to force open newspaper offices to anyone, however worthy, or to commandeer a newspaper's presses for any reason, however enticing.

2. The First Amendment Has Protected the Function of the American Press as Critic of Government

England's attempts to imprison Zenger and John Wilkes under the odious sedition laws led the draftsmen of the First Amendment to attempt to "make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible in the United States of America". Chafee, *Free Speech in the United States* 21 (1964). And in 1791 the First Amendment came into being.

Popular rejection of the Sedition Acts of 1798 reinforced the role of the press as an independent check on the vagaries and abuses of government. Chafee, *supra* 27. In commenting upon the traditional role of the press in our society, the Seventh Circuit quoted with approval from the District Court's opinion:

> "'Rather than regarded as an extension of the state exercising delegated powers of a governmental nature, the press has long and consistently been recognized as an independent check on governmental power. "The right of free public discussion of the stewardship of public officials was * * *, in Madison's view, a fundamental principle of the American form of government." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 275 (1964). So it is that the national policy favoring full and frank exercise of the press' freedom "may well

include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." . . .

In sum, the function of the press from the days the Constitution was written to the present time has never been conceived as anything but a private enterprise, free and independent of government control and supervision. Rather than state power and participation pervading the operation of the press, the news media and the government have had a history of disassociation.'" *Chicago Joint Board, Amalgamated Clothing Workers of America, AFL-CIO* v. *Chicago Tribune Company*, 435 F.2d 470, 474 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971).

The acceptance of a principle which perceives a role for government (whether executive, legislative, or judicial) as an innocent and beneficent intervenor on behalf of oppressed and disenfranchised individuals is not only unjustified by an analysis of our history as a people but is expressly refuted by the clear command of the First Amendment. This Court should reject the direct interference with editorial judgment proposed by appellee and reaffirm that "the historic function of newspapers, like the pamphlets of a prior day, has been to oppose government, to be its critic not its accomplice." *Resident Participation of Denver, Inc.* v. *Love*, 322 F. Supp. 1100, 1105 (D. Colo. 1971).

B. *F.S. § 104.38 Abridges the First Amendment Guarantee of Freedom of the Press*

The Florida Supreme Court found that F.S. § 104.38 "*assures*, and *does not abridge*, the right of expression which the First Amendment guarantees" and that it "sup-

ports the freedom of the press in its true meaning . . ." (emphasis in original). Appellee contends that the Florida statute does not infringe upon editorial discretion, and a newspaper would incur only minor inconvenience or slight financial hardship from being coerced into providing free space for self-serving statements by political candidates. *Amicus* submits that, on the contrary, the true meaning of the expression "freedom of the press" would not be assured or supported by this oppressive law, and its application would infringe impermissibly upon press liberty.

As this Court has observed, "The very possibility of having to engage in litigation,"—to say nothing of having to pay a fine or go to jail—"an expensive and protracted process, is threat enough to cause discussion and debate to 'steer far wider of the unlawful zone' thereby keeping protected discussion from public cognizance." *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 52-53 (1971). No editor can fail to be deterred by a statute which threatens him with these sanctions if he allows the "personal character of a candidate" to be "assailed" or if his newspaper charges "misfeasance" or criticizes the "official record" of the candidate. Whatever may be said for the point of view that a right of access to the media should be afforded the private individual who has been libeled, *cf. Rosenbloom*, at 47 n.15, the creation of a special privilege of reply for political candidates cannot avoid "stifling public discussion of matters of public concern." (*Id.* at 47.) And since the statute grants this right to those who have created it—candidates and officials who have themselves felt the sting of critical comments on their records and work—the Court should be especially wary of accepting the determination below that a need exists for such a law.

If political candidates are to be provided with a government-compelled platform to respond to criticism, there is no reason why other sectors of society should be denied a similar privilege. The novelist whose work has been criticized, the actor whose performance has been panned, even the baseball player whose skills have been publicly doubted in the sport columns, all may claim a similar privilege to repel attacks on their "official record". Historically, and long before *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), the common law recognized these criticisms were not defamations, at least in the absence of some showing of malice. Under such laws newspapers will be made into pallid compilations of the pros and cons of every issue, from the political to the artistic.

Nor should the Court accept the suggestion from appellee that only minor inconvenience or economic disadvantage will result from the Florida statute. The impression seems to be that newspapers have unlimited white space which can be easily opened up to the candidate who claims a right to response. It is not that easy. Especially for tabloid newspapers like those published by this *amicus*, tightly written and edited, space is at a premium. An edict that a candidate must be given a chance to reply to what the paper said about him can cause havoc. Since under the statute the reply must be "in as conspicuous a place" as the original charge, the result will be to crowd from the main news page a more current and important story, pushing it to a back page, with eventual displacement of either news or advertising. The newspaper will not run an extra four pages to carry a two-column reply; therefore, another story will not be published, or some advertising will be dropped, and on a regular basis this can be a serious economic problem.

To uphold this statute as only a modest infringement on editorial independence, suggests a reference to Mr. Justice Douglas' warning about the camel's head in the tent. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 148, 154 (1973) (concurring opinion). When governmental officials begin to require newspapers to publish or not publish certain kinds of articles, the door to abuses is open.

The Florida Court may have felt that this statute had a benevolent purpose, specifically, to provide more opportunity for the raising of differing viewpoints. But the attempt to achieve this goal through governmental interference with editorial discretion is barred by the First Amendment. Any public malaise resulting from an alleged lack of access to the press cannot be cured by government censor or government sanction.

The Florida Supreme Court viewed the fundamental purpose of the First Amendment to be "to inform the people" (App. 13), and found this underlying value to be served by F.S. § 104.38. However, in reaching this conclusion, that Court ignored not only the express wording of the Amendment, but also the historic and precedential interpretations of that wording. The Florida Court has, in effect, rendered this precise wording meaningless by promoting a beneficial value normally gained through strict adherence to the First Amendment. In exalting the desirable goal of open and diverse discussion, the Florida Court has allowed the hand of government to help set the type of the state's newspapers. Only last term, Mr. Justice Stewart warned against adopting invalid means to achieve beneficial results.

> "It is said that the goal of the Pittsburgh ordinance is a laudable one, and so indeed it is. But, in the words

> of Mr. Justice Brandeis, 'Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.' *Olmstead* v. *United States*, 277 U.S. 438, 479 (dissenting opinion). And, as Mr. Justice Black once pointed out, 'The motives behind the state law may have been to do good. But . . . [h]istory indicates that urges to do good have led to the burning of books and even to the burning of "witches".' *Beauharnais* v. *Illinois*, 343 U.S. 250, 274 (dissenting opinion)." *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376, 400, 403 (1973) (dissenting opinion).

Appellee urges upon this Court a novel and almost unique interpretation of the First Amendment. From appellee's viewpoint, the First Amendment provides to each citizen a right of access to the press through governmental sanction. This Court should not approve such a blatant effort to bypass the well established protection of the press in order to graft onto the First Amendment an allegedly laudable value in disregard of its express mandate. Indeed, Mr. Justice Stewart recently answered the very argument made here by appellee.

> "Perhaps [the] 'balancing' of First Amendment 'values' would require no more than that newspapers be compelled to give 'limited' access to dissident voices, and then only if those voices were 'responsible.' And perhaps it would require that such access be compelled

only when there was a single newspaper in a particular community. But it would be a close question for me which of these various alternative results would be more grossly violative of the First Amendment's guarantee of a free press. For that guarantee gives *every* newspaper the liberty to print what it chooses and reject what it chooses, free from the intrusive editorial thumb of Government.

"I profoundly trust that no such reasoning as I have attributed to the Court of Appeals will ever be adopted by this Court. And if I have exaggerated, it is only to make clear the dangers that beset us when we lose sight of the First Amendment itself, and march forth in blind pursuit of its 'values.'

"Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that 'fairness' was far too fragile to be left for a government bureaucracy to accomplish. History has many times confirmed the wisdom of their choice." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra* at 145-146 (concurring).

This claimed constitutional right of access has apparently been recognized only by the Florida Supreme Court and appellee's counsel. Barron, "Access to the Press—A New First Amendment Right", 80 Harv. L. Rev. 1641 (1967). Indeed, one three-judge District Court has explicitly rejected Professor Barron's theory.

"We are aware that lack of access to those media which reach large audiences has, some believe, given birth to a frustration which compels otherwise peace-

ful citizens to engage in violence to get their views to the nation. A cause of this frustration, one critic maintains, is that, although the courts have been vigorous in protecting free speech, they have been indifferent to creating opportunities for expression. Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967). We note, however, that while Professor Barron spends considerable space exploring a statutory solution to this problem, he devotes much less attention to constitutional arguments and but one paragraph to the problem of state action, which we find insurmountable." *Resident Participation of Denver, Inc.* v. *Love, supra* at 1105.

Other decisions also have found no First Amendment right of access to newspapers. In *Chicago Joint Board, Amalgamated Clothing Workers of America, AFL-CIO* v. *Chicago Tribune Company, supra,* plaintiff-union demanded that various newspapers in Chicago publish the union's editorial advertisement. In addition to rejecting plaintiff's First Amendment argument based on defendants' alleged state action in refusing its advertisement, the Court of Appeals also dismissed a right-of-access claim by an *amicus curiae.*

"It is urged that the privilege of First Amendment protection afforded a newspaper carries with it a reciprocal obligation to serve as a public forum, and if a newspaper accepts any editorial advertising it must publish all lawful editorial advertisements tendered to it for publication at its established rates. We do not understand this to be the concept of freedom of the press recognized in the First Amendment. . . . The

Union's right to free speech does not give it the right to make use of the defendants' printing presses and distribution systems without defendants' consent." 435 F.2d at 478.

The Court of Appeals for the Ninth Circuit found no inherent right of an individual to commandeer private newspapers for publication of his parochial, political or even commercial point of view. *Associates & Aldrich Company* v. *Times Mirror Company,* 440 F.2d 133 (9th Cir. 1971).

The Third Circuit, in emphatic language, denied the right of an individual to force the editors of the Rutgers Law Review to accept and publish an article. "The right to freedom of speech does not open every avenue to one who desires to use a particular outlet for expression." *Avins* v. *Rutgers, State University of New Jersey,* 385 F.2d 151, 153 (3rd Cir. 1967), *cert. denied,* 390 U.S. 920 (1968).

Last year, the Massachusetts Supreme Judicial Court considered proposed legislation which would have required newspapers to accept responsive paid political advertisements. Rejecting arguments almost identical to those asserted here by appellee, that Court found the law would have violated the First Amendment. *Opinion of the Justices to the Senate,* 298 N.E.2d 829 (Mass. 1973). The Massachusetts court firmly rejected the proposed law and stated:

"[C]ompulsion to publish all responsive political advertisements, applicable to all newspapers and other publications of general circulation in the Commonwealth, goes beyond what is essential to the furtherance of any interest of a State in its citizens having a right of access to newspapers in order to express, at their expense, political ideas which otherwise would not be

> published. • • • Indeed, no set of circumstances may exist which would support a legislative mandate that a newspaper or other publication of general circulation must publish a political advertisement." 298 N.E. 2d at 835.

This Court has repeatedly invalidated laws or governmental action which constituted prior restraint on the press. *E.g., Near* v. *Minnesota, supra; New York Times Co.* v. *United States,* 403 U.S. 713 (1971). Also, this Court has been swift to defend the liberty of the press from indirect prior restraints. *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936). Furthermore, this Court should find, as did the Ninth Circuit in *Associates & Aldrich Company* v. *Times Mirror, supra,* at 135, that no legal or practical distinction results from either *compelling* publication of certain material or *prohibiting* a newspaper from printing certain articles. Cf. *Rosenbloom* v. *Metromedia, supra* at 52-53.

The Florida Supreme Court has elevated this newly-claimed right of "access to the press" to a level which supersedes our traditional right of liberty of the press. Confronted with a similar opportunity to limit the press' liberty in furtherance of an allegedly beneficial value, this Court defended the traditional First Amendment right. *Mills* v. *Alabama,* 384 U.S. 214 (1966). There the Alabama Corrupt Practices Act prohibited the publication of newspaper editorials on election day. Appellant faced criminal charges for printing such an editorial urging the voters to adopt the mayor-council form of government. The Alabama Supreme Court found the law to be a reasonable restriction on the press and, in fact, aided the citizen's right to vote by reducing last minute, possibly inaccurate charges

which could not be refuted due to lack of time. In rejecting beneficent motives as a permissible justification for governmental intrusion upon editorial judgment, this Court reaffirmed the important position which the Constitution mandates for the American press.

> "The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, see *Lovell* v. *Griffin,* 303 U.S. 444, to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free. The Alabama Corrupt Practices Act by providing criminal penalties for publishing editorials such as the one here silences the press at a time when it can be most effective. It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press." 384 U.S. at 219.

Indeed, only last term this Court reaffirmed the role that the Constitution accords to freedom of the press. *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations, supra.* Despite approving narrow governmental

regulation in commercial decisions of newspaper management, Mr. Justice Powell stressed the limited application of the Court's opinion:

> "We emphasize that nothing in our holding allows government at any level to forbid Pittsburgh Press to publish and distribute advertisements commenting on the Ordinance, the enforcement practices of the Commission or the propriety of sex preferences in employment. Nor, *a fortiori*, does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists or its contributors. On the contrary, we affirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial. We hold only that the Commission's modified order, narrowly drawn to prohibit placement in sex-designated columns of advertisements for nonexempt job opportunities, does not infringe the First Amendment rights of Pittsburgh Press." 413 U.S. at 391.

Appellee's counsel can submit a handful of law review articles, but he can point to no judicial authority to support his inventive theory of a constitutional right of access to newspapers. This Court should not recognize and affirm a novel constitutional right at the expense of one of our most respected and enduring freedoms.

IV.

CONCLUSION

The judgment of the Florida Supreme Court and its interpretation of the constitutionality of Florida Statute 104.38 were not based on the fundamental principles of the First Amendment or any persuasive precedent; they impermissibly depart from the express prohibition of the First Amendment. This Court should reverse the judgment of the Florida Supreme Court and declare Florida Statute 104.38 unconstitutional.

Respectfully submitted,

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Supreme Court, U.S.
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a Division of Knight Newspapers, Inc.,

Appellant,

v.

PAT L. TORNILLO, JR.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF OF THE NATIONAL BROADCASTING COMPANY, INC. AS *AMICUS CURIAE*

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ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF OF THE NATIONAL BROADCASTING COMPANY, INC. AS *AMICUS CURIAE*

This brief is submitted on behalf of National Broadcasting Company, Inc. ("NBC"), as *amicus curiae,* in support of the position of appellant, The Miami Herald Publishing Company, a division of Knight Newspapers, Inc., *(Miami Herald)* that the judgment entered against it by the Supreme Court of Florida violates the First Amendment of the United States Constitution.

Consent of the Parties

All the parties to the proceedings below have given their consent to the filing of this brief and their letters of consent are on file with the Clerk of this Court.

Opinions Below, Jurisdiction and Statement

NBC adopts the material set forth in the equivalent sections of the brief of the *Miami Herald.*

Constitutional and Statutory Provisions Involved

The First Amendment of the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The principal statute involved in this case is Section 104.38, Florida Statutes, which is part of the Florida Election Code:

> "§ 104.38 **Newspaper assailing candidate in an election; space for reply**
>
> If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 [by imprisonment not exceeding one year] or § 775.083 [by a fine not exceeding $1,000]."

Question Considered in This Brief

Whether the First Amendment permits the State of Florida to compel a newspaper which publishes material critical of a candidate for public office to publish, in equal space and type, a reply by the candidate?

Interest of *Amicus Curiae*

NBC News, a division of NBC, is a news-gathering organization which prepares news and other informational programming on matters of public interest and concern which it furnishes to radio and television stations for broadcast in communities across the country.

The experience of the broadcast press is flatly contrary to the assumption of the Florida Supreme Court that "equal time" and "right of reply" formulations enhance First Amendment freedoms. This brief is submitted to illuminate that experience and thereby to demonstrate the factual error of the opinion here on review.

ARGUMENT

A State Statute Compelling Newspapers To Print Reply Material Which They Choose Not To Publish Violates The First Amendment.

Introduction

This landmark case has already led to exhaustive briefing on the part of all concerned, both the parties and their *amici* supporters. NBC believes that the case raises a legal issue far simpler of resolution than is often considered by this Court. Indeed, if the *Miami Herald* could cite no cases other than *Columbia Broadcasting System*,

Inc. v. *Democratic National Committee*, 412 U.S. 94 (1973) and *Mills* v. *Alabama*, 384 U.S. 214 (1966) and no text other than that of the First Amendment itself, we believe summary reversal would be justified.

We will not seek to add to the legal learning already before the Court with respect to the First Amendment itself. However, since the basis of the opinion of the Florida Supreme Court is that the statute in question "enhances rather than abridges freedom of speech and press," and since broadcasting has had experience with analogous, if less draconian rules,* we believe we can contribute to the information before the Court on that subject.

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* The editorializing rule of the Federal Communications Commission (the "Commission") requires a licensee who has editorially endorsed or opposed a candidate for public office to offer other candidates or their spokesmen "a reasonable opportunity" to "respond over the licensee's facilities." (47 C.F.R. § 73.123(c) (1972)) Neither that rule, nor the Commission's rules relating to "personal attacks" or equal time to rebut an actual appearance by a candidate (47 C.F.R. § 73.123(a), (b) (1972) and 47 U.S.C. § 315(a) (1970)) apply to "bona fide newscasts, bona fide news interviews and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing program. . . .)." Thus, insofar as the Florida statute fails to exclude from its regulation material printed in the course of ordinary news coverage, it extends well beyond the directly comparable regulations in the broadcast field.

The fairness doctrine of the Commission, unlike the rules set out above, reaches such general news coverage insofar as that coverage presents views on "controversial issues of public importance." The courts and Commission alike have rejected, however, the contention that the doctrine imposes an equal time requirement generally with respect to the presentation of controversial issues. *See Committee for the Fair Broadcasting of Controversial Issues*, 25 F.C.C. 2d 283, 292 (1970); *Brandywine-Main Line Radio, Inc.* v. *FCC*, 473 F.2d 16, 46 n. 133 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973); *Democratic National Committee* v. *FCC*, 460 F.2d 891, 902 (D.C. Cir.), *cert. denied*, 409 U.S. 843 (1972).

Apart from illustrating the error of the Florida Supreme Court's reliance on regulation of the broadcast industry as support for its decision, the demonstration above of the unprecedentedly broad sweep of the Florida statute suggests another infirmity of the

The Broadcast Experience

Unlike the print press in this country, the broadcast press has been subject to limited governmental regulation of content through the mechanisms of various laws and regulations.

The most prominent of these are the Federal Communications Commission rules relating to "Equal Time", "Personal Attack and Political Editorials" and the Fairness Doctrine (See note, p. 4 *supra*). These have been predicated in part on the view that given the limited number of frequencies available,* such regulation was permissible in the interest of assuring the existence of "an uninhibited marketplace of ideas in which truth will ultimately prevail. . . ." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969).

In fact, the experience of broadcast journalism is that all these regulations have not, taken separately or together, "enhanced" freedom of speech or press. One example of this may be seen in the fact that it took a suspension of the equal time regulations to permit television to make one of its most significant contributions to public knowledge and awareness and to permit the kind of "uninhibited" programming television is often criticized for not carrying. Only the passage of legislation suspending the equal

---

statute: its dangerous overbreadth. The statute may well inhibit newspaper coverage of general news issues unrelated, except in the most peripheral way, to the coverage of political campaigns or candidates which the Florida legislature apparently sought to regulate. Such overbreadth is itself a sufficient ground for reversing the decision below and holding the Florida statute unconstitutional. *See NAACP* v. *Button*, 371 U.S. 415 (1963); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

* *But see Brandywine-Main Line Radio, Inc.* v. *FCC, supra*, 473 F.2d at 80. (Bazelon, C.J. dissenting).

time rules *permitted* the broadcasting of the 1960 Kennedy-Nixon debates, which are often credited with leading to a larger percentage of voters going to the polls than ever before or since.*

The effects of governmental presence in these areas are felt by all broadcasters, but with particular harshness by the smaller ones which are understandably chary about confrontations with the very government that grants and considers renewals of licenses. As phrased by the Radio Television News Directors Association [RTNDA] in a recent submission to the FCC:

> "Indeed, it is the smaller stations and those stations less courageous and financially able than NBC which are the most sensitive to the 'lifted eyebrow' of government. Gradually editorial personnel of the news departments learn what management personnel know—that displeased government officials and private critics threaten a station's continued existence, or at least expensive litigation and damage to the station's good standing before the Commission." RTNDA Letter to FCC, July 16, 1973 re: *Complaint of Accuracy in Media, Inc.*, 8330-5, C2-2233, C2-1135, C11-2174.

As NBC Washington correspondent Bill Monroe pointed out in his testimony before the Senate Subcommittee on Constitutional Rights,

> ". . . there are stations that don't do investigative reporting. . . . There are stations that don't editorialize. There are stations that do editorialize but don't say anything.

---

* *See generally* White, *The Making of The President 1960*, Chs. 11, 14 (1961).

"There are stations that do outspoken editorials but are scared to endorse candidates. My opinion is that much of this kind of caution, probably most of it, is due to a deep feeling that boldness equals trouble with Government, blandness equals peace." *Hearings on "Freedom of the Press" Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong. 1st Sess. & 2d Sess. at 561 (1972). [Hereinafter cited as "Hearings."]

Moreover, it is an unfortunate truth that, as Mr. Monroe observed, "the FCC has no way to reward you for bold, controversial journalism. All it has is a way to harass you." Even a cursory review of the aftermath of many of broadcast journalism's "bold, creative" efforts documents the accuracy of that observation.

For example, each of the following news reports or discussions on problems in our society led to government investigations. However, these investigations were not of the problem exposed but of the *broadcaster* who chose to make such a report to the public:

The Selling of The Pentagon	*Complaint Concerning the CBS Program "The Selling of The Pentagon"*, 30 F.C.C. 2d 150 (1971)
Hunger in America	*Complaints Covering CBS Program "Hunger in America,"* 20 F.C.C. 2d 143 (1969)
Abortion Laws	*Complaint by Voice for Innocent Victims of Abortion*, 42 F.C.C. 2d 335, *rev. denied*, F.C.C. No. 73—1219 (Nov. 29, 1973)

Welfare Problems—"The Battle of Newburgh"	*Complaint Under Fairness Doctrine Requirements by Joseph McD. Mitchell,* 40 F.C.C. 526 (1962)
Gambling and Official Corruption	*Complaint Under Fairness Doctrine Requirements by Hon. John F. Thompson,* 40 F.C.C. 523 (1962)
Conditions in San Francisco's Chinatown	*Complaint by Accuracy In Media, Inc.,* 39 F.C.C. 2d 1011 (1973)
Bureaucracy (Brinkley comment)	*Complaint by Gary Lane,* 38 F.C.C. 2d 45 (1972) *rev. denied,* 39 F.C.C. 2d 938 (1973)
Migrant: An NBC White Paper	FCC Staff Letter to NBC dated July 24, 1970
Sex Education in Schools	*Complaint by the National Coalition on the Crisis in Education,* 26 F.C.C. 2d 586 (1970)
Air Traffic Congestion and Air Safety	*Complaints Concerning National Broadcasting Co., Inc.,* 22 F.C.C. 2d 446, *set aside, Petition by National Broadcasting Co., Inc.,* 25 F.C.C. 2d 735 (1970)
Government Aid to Education	*Complaint by Committee to Preserve Religious Liberty,* 25 F.C.C. 2d 733 (1970)

1968 Democratic Convention in Chicago	*Complaints concerning Network Coverage of the Democratic National Convention*, 16 F.C.C. 2d 650 (1969)
Poor Peoples' Campaign	*Columbia Broadcasting System, Inc.*, 17 P&F RADIO REG. 2d 843 (1969)
Report on The Port of New York Authority	*Complaint by The Port of New York Authority*, 25 F.C.C. 2d 417 (1970).

The very fact of such governmental inquiries into news programming has had its inhibiting effects. The industry has voiced its concern over what the "right of reply" formula is doing to the flow of information. For example, Robert Barron, President of the North Carolina Association of Broadcasters, testifying at the hearings before the Senate Subcommittee on Constitutional Rights, quoted one station manager as saying:

> "'. . . now that the fairness doctrine has been expaned [sic] so drastically, we have given serious consideration to taking the editorials off the air, because of the potential of so many splinter group requests for air time.'"

• • •

Mr. Barron continued:

> "Another television manager in a large city said, 'In order to try to keep abreast of all the rules and regulations and court decisions these days, I seem to stay on the phone constantly with our legal counsel in Washington. And, on many issues, the lawyers throw their hands up in bewilderment. Our legal fees, because of

these matters, have doubled in the past 2 years. We live in the constant fear that one day we are going to be penalized for doing something wrong.'

"A radio station manager in a medium sized town in 'Piedmont North Carolina' said that the recordkeeping is unreasonably burdensome and took an inordinate amount of time away from running his station. He said he felt he could provide a better service to his community if he were not required to devote so much time to the problem of keeping up with FCC and court rulings." *Hearings* at 408.

Thoughtful newsmen have concluded that inhibition is inherent in the system. "The effect I know on myself," said Walter Cronkite, testifying in the hearings before the Senate Subcommittee on Constitutional Rights. He went on to say:

"It is a matter here of, as insidious as it is, being constantly alert to my own reactions of being influenced by this threat in being. . . . There is a new element of awareness of things over here that are extraneous to the clear objective judgment of that news as I make the news judgment. I may feel that I have not been influenced, that I have not been intimidated, in other words, but in bending over to avoid being intimidated, I am intimidated. It is kind of a rapidly accelerating merry-go-round, but I think this is what happens." *Hearings* at 103.

Management representatives, Julian Goodman, President of NBC, Frank Stanton, then President of CBS and Elmer W. Lower, President of ABC News, expressed similar concerns. (See *Hearings* at 145, *et seq.*, 53, *et seq.* and 233, *et seq.*) NBC's executive head, Julian Goodman,

with a 20 year background as a news producer and executive, testified in part as follows:

> "The FCC rule dealing with fairness—its system of regulations called the fairness doctrine—has little in common with journalism. We are increasingly concerned at the process by which Government judgments are being made in this field.
>
> • • •
>
> "Even more serious than the resulting confusion is the fact that the FCC is deep into the news area, and this sort of Government oversight of the journalistic function does interfere with freedom of press expression." *Hearings* at 147.

Finally, the Florida statute under review assumes that it will be immediately evident and beyond reasonable dispute when material published by a newspaper attacks the "official record" of a candidate or office holder or otherwise assails him in a manner sufficient to trigger the reply provisions of the statute. However, the experience of NBC and other broadcasters makes clear the difficulties—and dangers—of any governmental effort to define the issues dealt with in a journalistic piece or the viewpoint taken in such piece. Henry Geller, former General Counsel of the Federal Communications Commission, has noted the inherent difficulty of ". . . judging whether a program segment is for, against, or neutral in regard to a particular issue. In the gray areas that are bound to arise in this respect, serious questions arise about the appropriateness of a government agency making such sensitive programming judgments." Geller, *The Fairness Doctrine in Broadcasting: Problems and Suggested Courses of Action*, at 11

(1973).* If such "serious questions" as to improper government intrusion and broadcaster inhibition arise with respect to agency enforcement involving only civil sanctions in a regulated industry, how much more serious are the questions raised by such problems when criminal sanctions can be applied.

Conclusion

In certain respects, the First Amendment rights of print press journalists and those who are engaged in broadcast journalism have diverged as a consequence of congressional legislation and this Court's *Red Lion* ruling. Questions as to the further implications of *Red Lion* for broadcast journalism are not before this Court today. However, for the Florida Supreme Court to suggest that the experience in the broadcast area should lead to a similar—not to say greater—constriction of the First Amendment rights of print press journalists is wholly insupportable.

We urge the Court to reverse the decision of the Florida Supreme Court.

---

* *See e.g.*, the definitional problems raised before the Federal Communications Commission in *Wildnerness Society*, 31 F.C.C.2d 729, 732 (1971) and *Accuracy In Media, Inc.*, 28 P&F RADIO REG. 2d 1371 (1973), petition for review docketed *sub. nom. National Broadcasting Co., Inc.* v. *FCC*, No. 73-2256, D.C. Cir., December 21, 1973; *see also Green* v. *FCC*, 447 F.2d 323 (D.C. Cir. 1971).

Dated: New York, New York
February 28, 1974

Respectfully submitted,

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FILE
FEB 28 19
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY, A DIVISION OF KNIGHT NEWSPAPERS, INC., *Appellant*,

v.

PAT L. TORNILLO, JR., *Appellee*..

On Appeal from the Supreme Court of Florida

BRIEF OF AMICUS CURIAE, THE NATIONAL NEWSPAPER ASSOCIATION, IN SUPPORT OF APPELLANT

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February 28, 1974

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY, A DIVISION OF KNIGHT NEWSPAPERS, INC., *Appellant*,

v.

PAT L. TORNILLO, JR., *Appellee*.

On Appeal from the Supreme Court of Florida

BRIEF OF AMICUS CURIAE, THE NATIONAL NEWSPAPER ASSOCIATION, IN SUPPORT OF APPELLANT

The National Newspaper Association hereby respectfully submits this brief as amicus curiae in support of Appellant's Appeal from the decree of the Supreme Court of Florida (entered October 10, 1973), which held that Florida Statute Section 104.38 did not violate the First Amendment of the United States Constitution. Written consents of appellant and appellee have been obtained pursuant to the Rules of this Court and are attached hereto.

STATEMENT OF THE CASE

Amicus curiae believes that Appellant has fully and fairly stated the facts of the case and, thus, hereby adopts Apellant's statement as its own.

QUESTION PRESENTED

Whether Florida Statute Section 104.38, which establishes a compulsory right of reply (under criminal sanctions) as a condition to publishing material critical of political candidates, violates the First Amendment of the United States Constitution.

INTEREST OF AMICUS CURIAE

The National Newspaper Association (NNA) is a nonprofit trade association whose membership is composed of more than 5,500 weekly newspapers and more than 950 daily newspapers published throughout the United States. The purposes of the Association are to: (a) promote the welfare of the newspaper industry, (b) provide a medium for united efforts of newspapers and allied arts of the industry to promote the best interests and welfare of the communities in which they are located and of the country generally, (c) secure improved standards in the practice of the profession of journalism and to promote a high standard of conduct and professional ethics in the profession, and (d) to act as an educational center and a medium for the dissemination of knowledge and information as to improved methods of managing and conducting newspaper affairs.

Nationwide, the weekly newspaper circulation of an average NNA member is approximately 4,700. Membership ranges from such newspapers as the Cedaredge

Sentry, Cedaredge, Colorado (paid circulation 450) and the Madison County Post, Richmond, Kentucky (paid circulation 420) to such members as the Lerner Newspapers of Chicago (combined paid circulation in excess of 180,000) and the Wilkes Barre Sunday Independent, Wilkes Barre, Pennsylvania (paid circulation 51,400). In Florida, the state in which the instant matter arose, NNA's membership includes more than 70 of the 135 weekly newspapers in the state and more than 40 of the 52 daily newspapers published within the state. The average circulation of the weekly Association members in the State of Florida is 5,185. Generally speaking, the Association represents the smaller weekly and daily newspapers throughout the country.

In their professional capacity, members of the Association, both in Florida and nationwide are sincerely fearful of the repressive effect upon editorial freedom – and, in particular the freedom of smaller newspapers – which would result if the Florida State Supreme Court's decision is upheld. If the decision is allowed to stand, newspaper freedom and, in turn, the freedom of the public to be informed free from governmental intervention and/or suppression, will have been dealt a serious and crippling blow.

ARGUMENT

The overriding illegality in Florida's compulsory publication statute is that it permits the government to impose its will directly upon the editorial freedom of action which lies at the heart of the First Amendment, and which, indeed, it was the very purpose of the First Amendment to protect. The compulsory right of reply statute directly imposes upon a newspaper the obligation to print (or, indirectly, not to print) a particular story. As this Court has plainly recognized: "For better or for worse, editing

is what editors are for; and editing is selection and choice of material." (*Columbia Broadcasting System, Inc. v. Democratic National Committee*, ___ U.S. ___, 36 L.Ed. 2d 772 (1973)). It is precisely the "selection and choice of material" function which the Florida statute takes away from editors and substitutes therefor a governmental command.

The threat which implementation of the compulsory reply statute poses is not merely fanciful rhetoric. The threat has been immediately perceived by NNA's members, and it is this "direct censorship" aspect of the statute which is most disturbing to NNA's journalists. Subsequent to the Florida Supreme Court decision here at issue, NNA polled its members to elicit their reaction to the decision. Their overwhelming response was that the statute strips from them their most precious possession – the freedom and, indeed, the responsibility to determine the what, when and wherefore of publication. Ironically, most respondents, in the exercise of their editorial discretion, routinely allow a right of reply through letters to the editor, etc. Yet they are equally alarmed that the government should attempt to dilute that freedom through compulsory reply statutes. The editorial prerogative is far too precious to be lost through government usurpation. And such particularly is the case when the area in which the compulsory reply statute operates (i.e., commentary and criticisms upon candidates for public office) is one in which governmental intervention is to be most avoided:

> . . . since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1935).

Clearly the Florida statute will have a direct effect upon editorial freedom. The statute, under pain of criminal sanctions, requires that if any newspaper "assails" the personal character of a candidate, or charges said candidate "with malfeasance or misfeasance in office" or "otherwise attacks" his official record, then the newspaper must "upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type . . ." In other words, a newspaper's freedom of action to criticize political candidates can only be exercised at the risk of requiring the newspaper to open up its columns to free political advertising by the candidate whose record it criticized. In effect, the statute requires the newspaper to exercise its journalistic freedom of criticism only if it is thereafter prepared to underwrite or subsidize the cost of candidate advertising. But the Florida Supreme Court never adequately discussed or persuasively demonstrated why newspapers should be placed in the position of being forced to become a print "common carrier" merely because they questioned the public performance of a candidate during an election period.

The problem is particularly acute with respect to smaller newspapers operating with low profit margins or, indeed, operating at a loss. Publishing a newspaper (even a small weekly newspaper) is an extremely expensive operation involving a blending of a high degree of editorial and mechanical skills. In order to survive, newspapers must depend upon revenue from advertising to cover the cost of production. If, as is the case in numerous local elections (both primary and general), the field of candidates is large, a compulsory reply statute forces an editor either to open up his column free of charge to a plethora of candidates, or (which is more likely) to refrain from exercising his critical judgment with respect to candidates

for public office. This dilemma creates precisely the chilling effect on the expression of free speech which this Court has so often declared to be unconstitutional.

Nor is the problem cost alone. The statute (even if specific enough to pass constitutional muster in terms of vagueness) is, nevertheless, susceptible to varying interpretations. No editor can view with equanimity the task of engaging in lengthy argument, and most probably expensive litigation, on the meaning of such terms as whether the item in question "assailed" the character of a candidate, or charged him with "malfeasance or misfeasance" or otherwise "attacked" his official record. The judicial branch will thus be compelled to act as the determiner of the meaning of such phrases, and will begin to create a series of "official governmental" standards in the form of definitions, interpretations, etc. This is precisely the type of direct governmental intervention which the First Amendment was intended to forbid.

The Florida State Supreme Court cited this Court's opinion in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1967) in support of its decision. Yet, the Florida Supreme Court not only ignored the language in *Red Lion* limiting its holding to the broadcast media, but, moreover, totally ignored this Court's later decision in *Columbia Broadcasting System, Inc.*, which emphasized that the First Amendment could never condone government usurpation of editorial freedom and discretion even in the broadcast media. Certainly nothing in *Red Lion* or *Columbia Broadcasting* can be read to support the proposition that the print media is entitled to less protection than the broadcast media. The peculiar and unique technological limitations which might support the fairness doctrine in the broadcast media are certainly not present in the print media.

The rationale followed by the Florida Court is clothed in terms of validating an appropriate state police power to insure free elections and/or to prevent media monopoly. Indeed, the Florida Court appears to accept the theory that right of reply statutes are actually statutes in furtherance of First Amendment goals. But the claim that freedom of editorial judgment can be abridged in the name of some ostensibly worthy social purpose has been rejected by this Court in *Columbia Broadcasting System, supra*, and has been rejected by numerous courts which have considered the matter. See, *e.g., Mills v. Alabama*, 384 U.S. 214 (1966); *Associates and Aldrige Co. v. Times Mirror Co.*, 440 F.2d 133 (1971); *Chicago Joint Board, Amalgamated Clothing Workers of America, AFL-CIO v. Chicago Tribune*, 435 F.2d 470 (7th Cir., 1970), *New York Times Co. v. United States*, 403 U.S. 713 (1971). *American Civil Liberties Union, Inc. v. Jennings*, 366 F. Supp. 1041 (D.C. D.C. 1973). The goals to be achieved by, and the values embodied in, the First Amendment will not be furthered by an interpretation which strips from the First Amendment the very editorial freedom which it was meant to protect. .

CONCLUSION

NNA respectfully submits that the judgment of the Supreme Court of Florida in this case should be reversed, and Florida Statute Section 104.38 should be declared unconstitutional as violative of the First Amendment.

Respectfully submitted,

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February 28, 1974

CERTIFICATE OF SERVICE

I, William G. Mullen, hereby certify that I have this 28th day of February, 1974 sent by postage prepaid first class United States airmail two copies of the foregoing Brief of Amicus Curiae, The National Newspaper Association, to:

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APPENDIX

NATIONAL NEWSPAPER ASSOCIATION

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February 14, 1974

Daniel P. S. Paul, Esquire
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In re: *The Miami Herald Publishing Company v. Pat L. Tornillo, Jr.*, U.S. Supreme Court No. 73-797

Dear Mr. Paul:

Pursuant to Rule 42 of the Rules of the Supreme Court, the National Newspaper Association hereby requests consent of the Miami Herald Publishing Company to the filing of a brief amicus curiae by the National Newspaper Association in the above referred case.

Your consent would be appreciated.

Sincerely,

/s/ William G. Mullen
General Counsel

WGM:vrk

Consented to: /s/ Daniel P. S. Paul
Attorney for Miami Herald Publishing Company

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February 14, 1974

Tobias Simon, Esquire
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In re: *The Miami Herald Publishing Company v. Pat L. Tornillo, Jr.*, U.S. Supreme Court Case No. 73-797

Dear Mr. Simon:

Pursuant to Rule 42 of the Rules of the Supreme Court, the National Newspaper Association hereby requests consent of Pat L. Tornillo, Jr. to the filing of a brief amicus curiae by the National Newspaper Association in the above referred case.

Your consent would be appreciated.

Sincerely,

/s/ William G. Mullen

WGM:vrk

Consented to: /s/ Tobias Simon
Attorney for Pat L. Tornillo, Jr.

FEB 23 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY
a division of
KNIGHT NEWSPAPERS, INC., *Appellant*,

v.

PAT L. TORNILLO, JR., *Appellee*.

On Appeal from the Supreme Court of Florida

BRIEF OF THE WASHINGTON POST COMPANY, AMICUS CURIAE, IN SUPPORT OF REVERSAL

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IN THE

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v.

PAT L. TORNILLO, JR., *Appellee.*

On Appeal from the Supreme Court of Florida

BRIEF OF THE WASHINGTON POST COMPANY, AMICUS CURIAE, IN SUPPORT OF REVERSAL

The Washington Post Company, a Delaware Corporation, submits this brief as *amicus curiae* in support of appellant's appeal from the judgment of the Supreme Court of Florida, entered on July 18, 1973, rehearing denied, October 10, 1973. Both parties to this action have given their written consent to the filing of this brief pursuant to Supreme Court Rule 42(1). Copies of letters of consent have been filed with the Clerk and are appended to this brief.

OPINION BELOW

The opinion of the Florida Supreme Court is reported at 287 So. 2d 78 (1973). The opinion of the Circuit Court of Dade County, which the Florida Supreme Court reversed, is reported at 38 Fla. Supp. 80 (1973).

JURISDICTION

The judgment of the Florida Supreme Court was entered on July 18, 1973. A Petition for Rehearing was denied by that court on October 10, 1973. A jurisdictional statement was filed on November 19, 1973. On January 14, 1974 this Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Florida Statutes § 104.38 provides:

> "§ 104.38 Newspaper assailing candidate in an election; space for reply.—If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon re-

quest of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083."

QUESTIONS PRESENTED

1. Whether, under the First Amendment, whenever a newspaper has criticized a candidate for public office, a State may compel the newspaper to print, without the exercise of any editorial control and free of charge, a reply to the criticism submitted by the candidate.

2. Whether a statute requiring a "newspaper" which "assails" the "personal character" of any "candidate" for public office or "attacks his official record" to print "any reply" that is "responsive" to the criticism is unconstitutionally vague under the First Amendment and the Due Process Clause of the Fourteenth Amendment.

3. Whether a statute which requires a newspaper to make space in its columns available free of charge to a class of persons designated by the statute takes the newspaper's property without compensation in violation of the Due Process Clause of the Fourteenth Amendment.

INTEREST OF THE AMICUS

The Washington Post Company is the publisher of *The Washington Post*, a daily newspaper, published in the Nation's capital. In addition, The Washington

Post Company is the parent of subsidiary corporations including Post-Newsweek stations which operate WPLG-TV in Miami, Florida and WJXT-TV in Jacksonville, Florida. The Washington Post Company through a subsidiary also publishes *Newsweek*, a nationally and internationally distributed news magazine.

STATEMENT

Appellee Pat L. Tornillo, leader of the Dade County Classroom Teachers Association, was a candidate for the Democratic Party's nomination to the Florida House of Representatives in a run-off election in the fall of 1972. On September 20, 1972 and September 29, 1972, *The Miami Herald* published editorials relating to Tornillo's candidacy.

On September 20, 1972, apparently for the second time, Tornillo submitted his own reply to the editorials and requested that *The Miami Herald* print it verbatim and free of cost, pursuant to § 104.38, Florida Statutes. *The Miami Herald* did not print the reply. Tornillo did not request a retraction under § 770.02, Florida Statutes, nor did he claim that the editorials were false or libelous.

On October 1, 1972, Tornillo filed a civil action in the Circuit Court for Dade County, Florida seeking declaratory relief, a mandatory injunction directing *The Miami Herald* to publish his reply, and damages. The Complaint did not allege that any statement in the published editorials was false or defamatory or was published with knowledge of falsehood or reckless disregard for truth. The Complaint merely alleged that the editorials assailed Tornillo's personal character and that they contained "willful, intentional, deliberate

and malicious attacks" upon him. *The Miami Herald* contended that § 104.38 is unconstitutional. The Circuit held an emergency hearing on October 2, 1972. The Attorney General of Florida was notified of the suit pursuant to § 86.091, Florida Statutes, requiring notice of any action in which a statute is alleged to be unconstitutional; and he was represented at the hearing.

The Attorney General advised the Circuit Court that because he doubted the constitutionality of § 104.38, he had refused to appeal from a prior decision holding it unconstitutional. That case, *State* v. *News-Journal,* 36 Fla. Supp. 164 (Volusia Cty. Judges Ct. 1972), apparently was the first brought under § 104.38 since its enactment in 1913. In the instant case the Florida Attorney General declined to defend § 104.38.

The Circuit Court dismissed the Complaint, holding § 104.38 invalid under the First Amendment and void for vagueness under the First and Fourteenth Amendments.

On appeal, the Florida Supreme Court reversed, one Justice dissenting.

SUMMARY OF ARGUMENT

Florida Statutes § 104.38 violates the First Amendment, which prohibits government at every level from dictating to the press what it must print. The claim that a state may, consistently with the First Amendment, tell a newspaper what to print is alien to our history and our law. In several recent cases this Court has reaffirmed the fundamental axiom that, with marginal exceptions, the freedom of the press means the freedom of every publisher of ideas to exercise, free from governmental control, his own independent edi-

torial judgment as to what ideas he will and what ideas he will not publish.

A governmental right to tell the press what to print presupposes governmental powers wholly inconsistent with a free and independent press. It presupposes governmental power to directly structure public debate and to control the direction of public attention. It also presupposes governmental power to decide what is newsworthy and, ultimately, to determine what information is effectively communicated to the public.

Governmental dictation of what newspapers must print would compromise their editorial integrity and destroy their independence. It would transform the press into agents and servants of government, certainly not the relationship contemplated by the Framers. It would also diminish the diversity among newspapers and deprive them of control over the quality of their product. Inclusion of required material may entail exclusion of other material and thereby operate as a prior restraint. In addition to its loss of editorial freedom, a newspaper is economically burdened when it is compelled to print material free of charge.

Section 104.38 abridges press freedom in all these ways. Moreover, in actual operation it will provide wholly inadequate procedural protection to newspapers' First Amendment interests, by subjecting them to the virtually unreviewable discretion of state trial judges acting on motions for temporary mandatory restraining orders and preliminary mandatory injunctions. Section 104.38 cannot be defended as granting only a narrow right of reply because during a political campaign candidates' rights of reply will consume massive proportions of newspaper space.

If a state seeks to educate its electorate, it can do so by means far less restrictive of First Amendment rights. A state can itself publish and distribute campaign materials, as Oregon and other states have in fact done. It can appropriate funds to purchase newspaper advertisements devoted to campaign materials. A state may also communicate information to the public by involving it in a news event which the press as a matter of course will cover.

There may be extreme circumstances of national emergency which would justify a government order to the press to print something, but no such circumstances are present here.

Section 104.38 does not merely tell the press what it must print. It also unconstitutionally penalizes protected speech. A newspaper is subject to the statutory obligation to print only if it has criticized a political candidate. Such criticism is not merely protected speech, but is at the core of First Amendment protection. A newspaper attack on a political candidate loses its First Amendment protection only if it is false and published with actual malice in the constitutional sense. No such limitation is incorporated in § 104.38, and the Complaint in this case did not even allege that any statement published by *The Miami Herald* was false or published with actual malice.

Thus § 104.38 imposes criminal and civil sanctions for engaging in protected speech and then failing to print a reply to such speech. Even truth, which was a defense under the Sedition Act of 1798, is no defense to § 104.38. Moreover, the more space a newspaper devotes to criticism of a candidate, the more it must yield to a reply. During a political campaign, large

segments of its front page and editorial page will be usurped for this purpose. Since replies must be printed free of charge, § 104.38 in effect imposes a tax on political criticism. The tax goes to the criticized candidate in the form of a free right to reply. This tax on newspapers is irrational and discriminatory and therefore violates the First Amendment. Because of these sanctions, the ultimate effect of § 104.38 will be to discourage newspaper criticism of political candidates.

Section 104.38 serves no compelling state interest. The free marketplace of ideas is alive and functioning well, and does not warrant state intervention. Political candidates, as a class, have more than ample access to the media. Campaign coverage is not limited to newspapers, but is carried by radio and television stations, local and national magazines, labor union, corporate, and other organizational publications, and the communications media established by candidates and their staffs.

The decline in the number of large metropolitan daily newspapers with general circulation has no First Amendment significance in view of the vast expansion of the marketplace of ideas through other media—radio, television, CATV, magazines, "underground" newspapers, organizational publications, and many others. The decline of large metropolitan newspapers reflects only the process of "creative destruction" which goes on regularly in any healthy and competitive market as sellers respond to changes in technology and consumer preferences.

Certainly not every new idea or point of view commands an immediate mass audience. But the First Amendment contemplates that new ideas must *earn*

such an audience through the self-help of their proponents and through competition with other ideas.

Section 104.38 seeks to vindicate reputation, not to promote public debate. It helps only those candidates who have attracted sufficient attention to warrant a newspaper attack. It does nothing for a candidate struggling in total obscurity. It provides for a reply even if the newspaper has already printed all that can be said in the candidate's defense. But it provides for no reply if the newspaper, instead of criticizing the candidate, misrepresents his positions on the issues or strongly endorses his opponent. The statute applies to all candidates, not just to those (if any) who may really need government help to obtain access. And it discriminates in favor of incumbent candidates by applying to attacks on official record but not to attacks on conduct in an unofficial capacity.

Section 104.38 is not analogous to a retraction statute. Retraction statutes apply only to speech that is false, defamatory and published with actual malice. The scope of § 104.38 is not so limited. Retraction statutes do not require the press to print anything: they merely provide that *if* a reply is printed, damages are reduced in some way. Thus, they do not interfere with the independence of the press, as § 104.38 does.

The premises of the fairness doctrine in broadcasting have no application to the print media. Technological considerations unique to broadcasting require governmental licensing of broadcasters. Where government creates and grants a monopoly, the recipient may be required to exercise his monopoly power fairly with respect to those excluded from the power and those affected by it. The fairness doctrine in broadcasting

is a product of this principle. As to the print media, no technological considerations can possibly justify a licensing system. No private printer enjoys a government granted monopoly. Accordingly, there is no basis for application of a fairness doctrine to the print media.

Approval of §104.38 would not promote free debate, but restrict it. Government imposed requirements of "fairness" might destroy publications whose success depends on appeal to an audience with a particular point of view. All publications would have a strong incentive to blunt their political criticism and confine it to the smallest possible space.

Section 104.38, a statute with criminal and civil sanctions, is unconstitutionally vague. The statutory terms "candidate," "assails the personal character," "charges . . . malfeasance or misfeasance in office," "attacks . . . official record," "newspaper," and "reply" are all vague and of uncertain scope. There is no adequate means for removal of this vagueness.

Section 104.38 takes a newspaper's property without compensation, and thereby denies due process of law. The statute works a physical invasion and occupation of newspaper property having significant economic value—space in its columns. This taking is not an incidental consequence of a generally valid regulation—it is the specific purpose of the statute. Section 104.38 is not directed at any "noxious" use of private property. It totally destroys the economic value of the property it affects. If the statute serves a public purpose, the cost of achieving that purpose should fairly be borne by the public (or by the candidates most particularly benefitted), not by newspapers.

ARGUMENT

I. FLORIDA STATUTE § 104.38 VIOLATES THE FIRST AMENDMENT

A. INTRODUCTION.

Florida statutes § 104.38 applies to a newspaper whenever "in its columns" it (1) "assails the personal character of any candidate for nomination or for election in any election," or (2) "charges said candidate with malfeasance or misfeasance in office," or (3) "otherwise attacks his official record," or (4) "gives to another free space for such purpose." These four categories will be referred to collectively herein as "attacking" a candidate.

Where § 104.38 applies, it requires the newspaper, subject to criminal and civil sanctions,[1] to print "immediately" a reply submitted by the candidate attacked. For his reply the candidate is entitled under § 104.38 to space that is equal in prominence and quantity to the space occupied by the attack, and he is entitled to have his reply printed in type of equal size. The newspaper must print the reply without charge.

For purposes of First Amendment analysis, two features of § 104.38 are critical. First, the statute re-

[1] The statute, in terms, provides only for criminal sanctions. Tornillo sued civilly for an injunction and damages. The trial court held that it could not enjoin a violation of the statute, and the Florida Supreme Court agreed. However, the Florida Supreme Court did not discuss whether a mandatory injunction would be an appropriate remedy once a newspaper has violated the statute by failing to print a reply "immediately." The Court also did not address itself to the appropriateness of a damage remedy. Nevertheless, in reversing the dismissal of the Complaint and remanding for further proceedings, the Court must have assumed that some civil remedy is available for violation of § 104.38.

quires newspapers to publish material which, as a matter of editorial judgment, they may want to reject. Second, whether the statutory sanctions apply depends entirely on the content of the newspaper: a newspaper must print a candidate's statement only if it has published an attack upon him.

In part B, *infra,* we show that any law providing that newspapers must publish certain material in their editorial or news columns is an unconstitutional invasion of the editorial freedom of the press, which no state interest can justify. In part C, *infra,* we show that this unconstitutionality is seriously aggravated when the provision for access is so designed as to regulate the *content* of a newspaper by attaching a penalty to criticism of political candidates. We also show that §104.38 is so designed. In part D, *infra,* we show that § 104.38 does not serve any valid purpose sufficient to justify the restraints on the press which it imposes.

B. THE FIRST AMENDMENT PROHIBITS GOVERNMENT FROM DICTATING TO THE PRESS WHAT IT MUST PRINT.

In the entire jurisprudence of this Court, it has never, before this case, been suggested that the First Amendment permits government to compel a newspaper to print something, under pain of criminal and civil sanctions. The assertion of any such power is alien to our national history as well as to our law. At the turn of the 19th Century, when there was general concern about the "abuses" of the press, particularly in its attacks upon public men, those who argued for some countervailing protection relied on the law of libel. The great question at that time was whether the First Amendment permitted the survival of the English common law of seditious libel. See 4 Elliot's Debates

528-82. Had anyone suggested that a government subject to the First Amendment could remedy the abuses by the press by compelling the publication of retractions, replies, or other materials,[2] the broad and decisive answer was given by Madison:

> "In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands . . . .
>
> "Is, then, the federal government, it will be asked, destitute of every authority for restraining the licentiousness of the press, and for shielding itself against the libellous attacks which may be made on those who administer it?
>
> "The Constitution alone can answer this question. If no such power be expressly delegated, and if it be not both necessary and proper to carry into execution an express power; above all, if it be expressly forbidden, by a declaratory amendment to the Constitution,—the answer must be, that the federal government is destitute of all such authority." 4 Elliot's Debates 570, 572-73.

The absence from our constitutional history of any claim of government power to compel the press to

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[2] Mr. Justice Douglas has noted that Benjamin Franklin strongly rejected the view that he was under an obligation to open the pages of his paper to all controversialists. *CBS* v. *Democratic National Committee*, 412 U.S. 94, 152 (1973) (concurring opinion). It is not clear that any proponent of such an obligation thought it was legally enforceable, or that it could be enforced by a government subject to the restrictions of the First Amendment. The First Amendment at that time did not apply to the States.

print reflects a fundamental First Amendment axiom. That axiom is that, with marginal exceptions,[3] the freedom of the press means the freedom of every publisher of ideas to exercise, free from governmental control, his own independent editorial judgment as to what ideas he will and what ideas he will not publish.

In three recent cases this Court has restated the fundamental axiom. In *Pittsburg Press Co.* v. *Pittsburg Comm'n on Human Relations,* 413 U.S. 376, 391 (1973), the Court, per Mr. Justice Powell, explained:

> "Nor *a fortiori,* does our decision authorize any restriction whatever, whether of content of layout, on stories or commentary originated by the Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial."

See also 413 U.S., at 393-97 (Burger, C. J., disenting); 413 U.S., at 397-99 (Douglas, J., dissenting); 413 U.S., at 400 (Stewart, J., joined by Douglas, J., and expressing the view of Blackmun, J., dissenting) ("[T]he question . . . is whether any government agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot. Under the First and Fourteenth Amendments I think no government agency in this nation has any such power."). Similarly

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[3] *E.g.,* fighting words, *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942); obscenity, *Miller* v. *California,* 413 U.S. 15 (1973); libel with actual malice, *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964); and speech presenting a clear and present danger of imminent injury to a vital public interest, *Schenck* v. *United States,* 249 U.S. 47 (1919).

in *Cohen* v. *California,* 403 U.S. 15, 24 (1971), the Court, per Mr. Justice Harlan, stated:

> "The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."

In *CBS* v. *Democratic National Committee,* 412 U.S. 94 (1973), all the Justices who addressed the point agreed that the fundamental axiom applies to the print media. The Chief Justice wrote for himself, Mr. Justice Stewart and Mr. Justice Rehnquist:

> "The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers." 412 U.S., at 117-18.

As Mr. Justice Stewart expressed it, the First Amendment "gives *every* newspaper the liberty to print what it chooses, free from the intrusive editorial thumb of Government." 412 U.S., at 145 (concurring opinion) (emphasis in original). Mr. Justice Douglas was of the same view. See 412 U.S., at 150-52 (concurring opinion). Even Mr. Justice Brennan and Mr. Justice Marshall, who, in dissent, thought there is a First Amendment right of access to the broadcast media,

agreed that the First Amendment not only does not create a right of access to the privately owned print media, but also prohibits government from regulating the print media so as to create such a right. 412 U.S., n.12 at 182 (dissenting opinion). See also *Thomas* v. *Collins,* 323 U.S. 516, 545 (1945) (Jackson, J., concurring) ("The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.").

The reasons for the fundamental axiom and for these judicial statements are inherent in the system of freedom of expression ordained by the First Amendment. The Amendment established a system in which all persons and groups of persons have a right to publish information and opinions as they choose, and in whatever form they choose. "The theory of our Constitution is that every citizen may speak his mind and every newspaper express its views on matters of public concern . . . ." *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 299 (1964) (Goldberg, J., concurring). Government is barred from prohibiting or requiring the expression of opinion, or the communication of information, on matters of public concern. Professor Chafee has pointed out that "there is no bright line between encouragement and repression," 2 Z. Chafee, Government and Mass Communications, 710 (1949):

> "Whenever anybody is inclined to look to the government for help in making the mass media do what we desire of them, he had better ask himself one antiseptic question: "Am I envisaging myself as the official who is going to administer the policy which seems to me so good?" Justice Holmes remarked that, when socialism came, he hoped he would be "on the committee". You and

> I are not going to be on the committee which is charged with making newspapers or radio scripts better written and more accurate and impartial. It is very easy to assume that splendid fellows in our crowd will be exercising the large powers over the flow of facts and opinions which seem to us essential to save society, but that is an iridescent dream. We must be prepared to take our chances with the kind of politicians we particularly dislike, because that is what we may get." *Id.*, 709.

The system of free expression is a regime of laissez faire protected by the First Amendment from the heavy hand of government intrusion. This zone of freedom is protected against four principal types of intrusion: against prior censorship, *e.g.*, *Near* v. *Minnesota*, 283 U.S. 697 (1931); *New York Times Co.* v. *United States*, 403 U.S. 713 (1971); against subsequent sanctions against protected speech, *e.g.*, *New York Times Co.* v. *Sullivan*, *supra*; *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Speiser* v. *Randall*, 357 U.S. 513 (1958); against discrimination, *e.g.*, *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); and against government dictation of what must be printed. Though our history provides no experience of government dictation to the press, its evils are readily apparent on analysis.

A governmental right to tell the press what to print presupposes governmental powers wholly inconsistent with a free and independent press. In dictating to a newspaper what it must print, government asserts either a power to determine what is newsworthy, or a power to decide what (or whose) editorial views are to be expressed. Since § 104.38 in terms applies to all

the "columns" of a newspaper, including both news and editorial columns,[4] it follows that Florida asserts both powers. And both strike at the heart of freedom of the press.

If government had the power to dictate to a newspaper what material it shall print in its news columns, it would have the power directly to structure public debate and to control the direction of public attention. Except for the power to censor, no governmental power could be more inconsistent with the First Amendment than this. If government were ever permitted under our Constitution to decide that this event deserves more press coverage than that, or that this man's statements should be covered more fully, regardless of what other matters are competing for space and prominence, freedom of the press as we have known it would end. For a newspaper can adequately report events only by making complex judgments of relative newsworthiness. If government ever is permitted to make these judgments, it and not the press will have the ultimate power to determine what information is effectively communicated to the public. As Zechariah Chafee wrote:

> "[L]iberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper. A journal does not merely print observed facts the way a cow is photographed through a plate-glass window. As soon as the facts are set in their context, you have interpretation and you have selection, and editorial selection opens the way to editorial suppression." 2 Z. Chafee, Government and Mass Communications 633 (1949).

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[4] The Florida Supreme Court pointedly held that under § 104.38 a newspaper must print a reply responsive to "the charge made in the *editorial or other article* in the newspaper being replied to." (Emphasis added).

Similarly intolerable consequences would follow if government had the power to direct that certain editorial views or the editorial views of certain persons be printed, even in the interest of "fairness." By exerting its coercive power directly on the expression of editorial opinion, the government would be arrogating to itself a power to direct the formation of public opinion. "Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that 'fairness' was far too fragile to be left for a governmental bureaucracy to accomplish. History has many times confirmed the wisdom of their choice." *CBS* v. *Democratic National Committee, supra,* at 145-46 (Stewart, J., concurring).

In *CBS* v. *Democratic National Committee, supra,* at 124-25, this Court wrote:

> "Nor can we accept the . . . view that every potential speaker is 'the best judge' of what the listening public ought to hear or indeed the best judge of the merits of his or her views. All journalistic tradition and experience is to the contrary. For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt .... Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression."

Editing of newspapers is the function of editors. It is not the function of government, or of political candidates or other persons designated by government.

Government dictation of what a newspaper must print would compromise the newspaper's integrity, and destroy its independence. Under § 104.38, for example, newspapers become mouthpieces for persons designated by government. To the extent that newspapers must print materials specified by such persons, they become agents and servants of government, carrying out government's will by publishing to the public materials that government commands shall be published. That is the relationship between press and government in totalitarian countries, where much of the content of newspapers is government-ordained propaganda. It is not the relationship contemplated by the Framers. Our Constitution established between government and the press a relationship of mutual independence and tension: as Mr. Justice Black wrote in *New York Times Co.* v. *United States,* 403 U.S. 713, 717 (1971):

> "In the First Amendment the Founding Fathers gave the press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government."

See also the quotation from James Madison at p. 13, *supra*; *Mills* v. *Alabama,* 384 U.S. 214, 219 (1966). The great tradition of the free press in America lies in its total independence from government, not in subservience to government.[5]

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[5] As the court stated in *Resident Participation of Denver, Inc.* v. *Love,* 322 F. Supp. 1100, 1105 (D. Colo. 1971), "[T]he historic function of newspapers, like the pamphlets of a prior day, has been to oppose government, to be its critic not its accomplice."

Every responsible news publication manifests its own editorial integrity. Each develops and applies its own approach to reporting, analyzing and commenting upon the news. Readers of publications as diverse as, say, *The Washington Post,* the *New York Daily News, The Wall Street Journal, TIME,* and the *Berkeley Barb* expect quite different editorial products from them. They expect different types of news reporting,[6] editorial opinion, and literary style. A requirement by government that publications such as these print particular materials would destroy their editorial integrity, and diminish the uniqueness of each and the diversity among them, thereby reducing the choices available to consumers of news and opinion.

A government requirement to print would also deprive the press of quality control over the materials that must be printed. The editors of every responsible news publication apply to the articles they publish standards of newsworthiness, factual accuracy, objectivity, fairness, and literary quality. They do not voluntarily fill their pages with articles on subjects that have no news value or that are inaccurate or misleading, biased, unfair, or poorly written. And yet, if required by law to print materials designated by government, newspapers may have to admit such articles into their publications. For example, if newspapers are required to print candidates' statements verbatim, without editorial control, they are likely to find their pages crowded with press releases and other turgid campaign pap.

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[6] *E.g.*, investigative reporting, muckraking, advocacy journalism, "straight" or "objective" reporting, summary or comprehensive reporting.

A requirement to print burdens the press in other ways. Inclusion of the required material may, as a practical matter, entail exclusion of other material, and thereby operate as a prior restraint. This consequence is particularly aggravated in the case of § 104.38, where the statute in some circumstances requires that material be printed in a particularly limited space, such as the front page or the editorial page. In the instant case, the replies would have to be printed on the editorial page or in other space deemed "equally conspicuous." Where, as in the case of § 104.38, the requirement is that the material be printed without charge, the newspaper bears the economic cost of publication.

Section 104.38 abridges editorial freedom and otherwise burdens the press in all these ways. It does so even though its enforcement does not require an administrative agency. Although this particular statute does not inflict on the press a host of administrative copyreaders, it does subject the press to an enforcement procedure that does not sufficiently protect its First Amendment interests. The statute avoids the creation of an administrative agency to oversee the press only by placing the entire administrative burden on the courts and by leaving much of its practical operation shrouded in vagueness. As a practical matter, during the heat of political campaigns, § 104.38 will be administered by a host of individual state trial judges exercising virtually unreviewable discretion to grant or deny temporary mandatory restraining orders and preliminary mandatory injunctions. That is the setting of the instant case, which reached the appellate stage only because of the persistence of Mr. Tornillo and, presumably, his claim for damages. Once a viola-

tion occurred and to remedy it a trial judge ordered the printing of a reply "immediately" in accordance with § 104.38, a newspaper could obtain appellate review only by risking contempt. The statutory term "immediately" seems to leave no room for stays. A statute which thus imposes undue procedural burdens on First Amendment claims is unconstitutional for that reason alone. See *Speiser* v. *Randall,* 357 U.S. 513 (1958). Moreover, if § 104.38 is upheld, there would be nothing to prevent Florida from "improving" its administration by establishing an agency to look over the press' shoulder and render advisory opinions or even mandatory orders. The vagueness of § 104.38 is discussed at pp. 52-55, *infra.*

Nor can § 104.38 be defended as granting only a very narrow right of reply—to political candidates rather than to the public at large. A candidate's right to reply to every criticism published by a newspaper during a political campaign will consume massive proportions of a newspaper's space—particularly, under § 104.38, space on the first few pages and the editorial page. See pp. 31-32, *infra.*

The fact that government compulsion to print would invade the freedom of the press so substantially is not the full explanation of either the First Amendment's prohibition of such compulsion or its total absence from our history. The rest of the explanation lies in the availability of ready alternatives to carry out whatever governmental policies may be furthered by compulsion to print. Such alternatives are far less restrictive—or not restrictive at all—of First Amendment rights.

If government wants to communicate information to the people, it can publish the information itself. The

federal government has its own printing office. This Court itself publishes three or four volumes every year. All of the states publish a wide variety of documents and other materials. If a state wants to promote the political education of the electorate, it can publish and distribute materials relevant to a campaign, including candidates' statements, as Oregon and other states have in fact done.[7]

If a state for some peculiar reason wants particular materials to reach the readership of a particular newspaper, it can appropriate funds to buy an advertisement in that newspaper. Although a newspaper may not under the First Amendment be compelled to accept an article, *Avins* v. *Rutgers,* 385 F.2d 151 (3rd Cir. 1967), cert. denied, 390 U.S. 920 (1968), or an advertisement, *Chicago Joint Board ACWA* v. *Chicago Tribune Co.,* 435 F.2d 470 (7th Cir. 1970) cert. denied 402 U.S. 973 (1971); *Associates & Aldrich Co.* v. *Times Mirror Co.,* 440 F.2d 133 (9th Cir. 1971); *Opinion of the Justices,* 298 N.E.2d 829 (Mass. 1973),[8] it may do

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[7] D. Balmer, State Election Services in Oregon 21 (1972) (Citizen's Research Foundation, Princeton, N. J.).

[8] There the Supreme Judicial Court unanimously held unconstitutional a proposed statute that would have imposed a fairness doctrine with respect to paid political advertisements in newspapers. Under the bill, any newspaper which had accepted a paid political advertisement with respect to any candidate for public office or any measure to be voted on was required to accept all other advertisements relating to any other candidate for the same office or to other views on the measure to be voted on. This statute was far less offensive to the First Amendment than § 104.38 since (i) it required only the printing of an advertisement, not of a reply to a news article or editorial, and so did not intrude upon a newspaper's news coverage or expression of editorial opinion; (ii) the obligation to print was triggered only by the printing of an advertisement and not by criticism of a candidate in a news

so voluntarily to serve the public interest and its own economic interest. For example, if a state wants to assure that newspaper readers receive enough campaign information to make an intelligent voting decision, it can purchase advertising space in newspapers and fill the space with candidates' statements and other relevant material. Certainly, before resorting to compulsion against the press to achieve its purposes, a state must exhaust the possibilities for achieving them through voluntary agreement.

Government may also communicate information to the people by involving it in a news event which the press as a matter of course will report. The public statements of high officials at every level of government (local, state and federal) are routinely reported by newspapers. Since, as a practical matter, significant official statements are always reported, government never finds it necessary to resort to compulsion. This consideration applies with equal force to the asserted purpose of § 104.38, to inform the public adequately about candidates for public office. Among all the criticisms made of newspapers, one never (or almost never) hears it said that they fail to give sufficient coverage to political campaigns or to the statements of political candidates. Indeed, political candidates, as

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article or editorial, so that the statute did not chill the publishing of criticism of candidates in news articles or editorials; (iii) the statute did not require that the reply advertisements be printed in any particular place in the newspaper, and so did not interfere with editorial judgment as to relative newsworthiness or layout; and (iv) the statute required the printing only of reply advertisements that were paid for. Nevertheless, the court found that the statute was not supported by any compelling state interest, and that under the decisions of this Court no circumstances could justify a legislative mandate that a newspaper publish a political advertisement.

a class, have a highly developed talent for giving their actions and statements news value; and as a result they in fact receive very heavy coverage by newspapers and other news media. In the absence of any showing by Florida that there is a pressing public need to compel newspapers to print candidates' statements because the press does not otherwise report them sufficiently, §104.38 is a totally unjustified invasion of the freedom of the press.

It may be that one could imagine extreme circumstances of national emergency and near total breakdown of communications where government would have a sufficient interest to justify ordering the press to print certain vital information needed by the public. Such situations would be analogous in their rarity to situations where the government may impose censorship. See *Near* v. *Minnesota,* 283 U.S. 697, 716 (1931) (to prevent "the publication of the sailing dates of transports or the number and location of troops"). Plainly, no such circumstance is even arguably presented in the instant case.

Finally, no prior decision of this Court supports the view that a state may dictate to a newspaper what it must print in its news and editorial columns. *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969), and *CBS* v. *Democratic National Committee,* 412 U.S. 94 (1973), both involved regulation of broadcasting rather than of any print medium. In each case the Court was careful to state that its decision was based on the unique characteristics of broadcasting and in no way affected the rights of the print media. See 395 U.S., at 386-90; 412 U.S., at 101. The distinctions between the print and broadcast media are fully discussed at pp. 43-49, *infra.*

Pittsburgh Press Co. v. *Pittsburgh Comm'n on Human Relations,* 413 U.S. 376 (1973), also did not involve any assertion of governmental power with respect to news or editorial columns. The Court there sustained an order that a newspaper not use sex-designated headings for help-wanted advertisements in its classified advertising section. The Court emphasized that the administrative order upheld did not in any way burden protected speech, 413 U.S., at 388-89, 390, and that its own decision did not authorize any regulation of the news or editorial content of a newspaper, 413 U.S., at 391.

Associated Press v. *United States,* 326 U.S. 1, 20 (1945), involved an antitrust attack on a newspaper association's group boycott of nonmembers, which prevented them from obtaining news. This Court sustained the attack against First Amendment challenge on the ground that the First Amendment does not protect private conspiracies to censor the dissemination of news. From the fact that government may enjoin concerted refusals to deal, it does not follow that it may affirmatively require the press to print certain information or opinions. The Court's opinion in *Associated Press* did not remotely suggest that a single newspaper acting alone and in full compliance with all laws could be required by government to print something it did not wish to print.

The public forum cases, *e.g., Marsh* v. *Alabama,* 326 U.S. 501 (1946); *Amalgamated Food Employees* v. *Logan Valley Plaza,* 391 U.S. 308 (1968), involved property already dedicated to the kind of public use for which a right of access was being asserted. Where property is not so dedicated, this Court has held there is no right of access. *Adderley* v. *Florida,* 385 U.S. 39

(1966); *Lloyd Corp.* v. *Tanner,* 407 U.S. 551 (1972). A privately-owned newspaper is not a public forum. It is one participant among many in a public forum embracing all media of communication, see pp. 34-39, *infra.* A newspaper is not dedicated to public use beyond the editorial control of its management.[9] Certainly no argument could possible be made that *The Miami Herald* or any other newspaper has dedicated its news or editorial pages to public use. Rather, under the First Amendment, a newspaper has an unfettered right to express its own interpretation and opinion of the news, and government may no more compel it to express the views of someone else than it may compel a soapbox orator or any other participant in public discussion to do so.

C. SECTION 104.38 UNCONSTITUTIONALLY PENALIZES PROTECTED SPEECH.

In the foregoing section, we treated § 104.38 as if it merely required a newspaper to devote a certain amount of space to the printing of candidates' statements, regardless of what it had printed in the past. Section 104.38, however, goes beyond a content-neutral requirement to print. It is a right-to-reply statute, which comes into operation only when a newspaper has attacked a public official seeking re-election or another candidate for public office. Thus here as in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), the Court is "adjudicating in an area which [lies]

[9] Many newspapers do print letters to the editor from members of the public. Publication of such letters in whole or in part is always subject to the editorial control of the newspaper. And it has never been thought that newspapers have any legal obligation to print such letters. The same considerations apply to the printing of advertisements. See cases cited at p. 24, *supra.*

close to seditious libel . . . ." *Curtis Pub. Co.* v. *Butts,* 388 U.S. 130, 153 (1967) (opinion of Harlan, J., for himself and Clark, Stewart & Fortas, J. J.).[10] Whether § 104.38 applies to any newspaper depends on its content: on whether it has attacked a candidate. The statute is therefore unconstitutional as a regulation of newspaper content: it penalizes protected speech, in violation of the First Amendment.

Section 104.38 is triggered by verbal attacks on candidates. It requires little space to show that such attacks are not merely constitutionally protected, but are at the core of First Amendment protection. In *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964), the Court said:

> "[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

In *Near* v. *Minnesota,* 283 U.S. 697, 719-20 (1931), Mr. Chief Justice Hughes wrote for the Court:

> "While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile,

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[10] Criticism of candidates is entitled to the same First Amendment protection as criticism of public officials or of government. *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 271-72 (1971).

> the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press . . . ."

See also Mills v. *Alabama,* 384 U.S. 214, 218-19 (1966); *Rosenblatt* v. *Baer,* 383 U.S. 75, 85 (1966); *Garrison* v. *Louisiana,* 379 U.S. 64, 74-75 (1964); *Watts* v. *United States,* 394 U.S. 705, 708 (1969); *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 271-72 (1971).

A newspaper attack on a political candidate loses its First Amendment protection only when it is false and defamatory and is published with "actual malice," *i.e.,* knowledge that it is false, or reckless disregard as to whether it is true or false. *New York Times Co.* v. *Sullivan, supra.* Florida has incorporated no such restriction in §104.38 so as to keep the statute within constitutional limits. The Complaint in the instant case did not even allege that any statement published by *The Miami Herald* was false or defamatory or was published with actual malice in the constitutional sense. Thus, the sanctions of §104.38 are triggered by any attack on a candidate, even one that is true, fair, objective, moderate and balanced, and thus fully protected by the First Amendment. Even if the newspaper has itself presented both sides of a controversy concerning a candidate, if it has included a criticism of him it must print his reply.

The sanctions themselves are penalties for criticism of a candidate. Under the decision below, if a news-

paper attacks a candidate and then does nothing more, it can be subjected to criminal and civil remedies for failure to print a reply. Truth was a defense even under the infamous Sedition Act of 1798, 1 Stat. 596,[11] but it is no defense under § 104.38. If a newspaper attacks a candidate, it must perforce relinquish its editorial independence, succumb to government compulsion, and print what the person designated by government orders it to print.

The provisions of § 104.38 maximize the burden it imposes on newspapers to which it applies. The amount and quality of space that must be devoted to a reply are identical to the amount and quality of the space devoted to the attack. Thus, the more space a newspaper devotes to criticism of a candidate, the more space it must yield to a reply, and the deeper is the bite of § 104.38 into its editorial freedom. The more front page or editorial page space a newspaper devotes to discussion of the defects in a candidate's character or record, the more such prime space it must sacrifice for a reply. The impact of this aspect of § 104.38 can be understood by considering the effect § 104.38 would have had if during the period from July to November, 1972, when Mr. Nixon was a candidate for re-election to the Presidency, he had been entitled to equal space on the front page and editorial page of *The Washington Post* to reply to every published attack on the record of his administration and his campaign staff with respect to Watergate and all other matters.

These consequences will be devastating for newspapers during election campaigns. The stock in trade

[11] The Sedition Act is discussed in *New York Times Co.* v. *Sullivan*, *supra*, at 273-76.

of candidates' speeches is attacks upon the personalities and records of their opponents. A newspaper which faithfully reports the substance of such attacks in its news columns must, under § 104.38, give equal and equally conspicuous space to replies from the attacked candidates. Of course, *their* speeches attacking *their* opponents will also generate rights to reply. A newspaper reporting on a campaign involving candidates for numerous offices will find itself swamped with replies which it must print. Large segments of its front page and editorial page will be usurped for this purpose. [12]

Under § 104.38, replies must be printed free of charge. The effect of this provision is to impose a discriminatory tax on political criticism. Every time a newspaper criticizes a political candidate, it must pay a tax of as much as the economic value of the newspaper space used for the attack. The tax goes to the criticized candidate in the form of a free right to reply. A candidate with a full campaign treasury who attacks an opponent with no money does not have to give a free and equal right to reply. Why must newspapers? Because they have exercised a constitutional right to criticize? That answer is plainly inadmissible. Because they have unique influence over the public? That cannot be assumed and has not been shown. See pp. 34-39, *infra*. Because they can afford to pay? That can not be assumed, as to some newspapers is certainly false, and, as limited to newspapers, the argument is plainly arbitrary and unreasonable. There is no good answer. Viewed as a tax

[12] This argument does not take into account the possibility that a reply will itself give rise to a right of reply, so that an extended (if not infinite) series of replies would have to be printed, all at the cost of the newspaper's editorial freedom.

on criticism by newspapers, § 104.38's imposition of a *free* right to reply is irrational and discriminatory, and therefore a violation of the First Amendment. *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Curtis Pub. Co.* v. *Butts*, 388 U.S. 130, 150-51 (1967) (opinion of Harlan, J. for himself and Clark, Stewart and Fortas, J. J.) (state regulations may not "constitute a special burden on the press"); *Speiser* v. *Randall*, 357 U.S. 513, 529-30, 536 (1958) (Black, J., concurring; Douglas, J., concurring).[13]

The ultimate effect of § 104.38's imposition of a penalty for criticizing political candidates is to discourage such criticism. A newspaper that wants to maintain its editorial independence must avoid publishing criticism. If it decides to publish an attack on a candidate, it has a strong incentive to confine it to the smallest possible space. The statute introduces a new and alien factor into decisions on whether or not to publish: whether the article under consideration is worth the risk of having to print in equal and equally conspicuous space a reply *whose content cannot be known in advance*. Inevitably, the statute will take its toll of news and editorial copy. As the Court held in *New York Times Co.* v. *Sullivan*, *supra*, at 279, "The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments."

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[13] Of course, the press has no immunity from the general obligation of citizens to pay taxes. But as the Court held in *Murdock* v. *Pennsylvania*, *supra*, at 112, "It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon." The same applies to a tax for the privilege of publishing an editorial critical of a political candidate.

D. SECTION 104.38 SERVES NO COMPELLING STATE INTEREST.

1. The Free Marketplace of Ideas Is Alive and Functioning Well, and Does Not Warrant State Intervention

There is much irony in the circumstance that in this, the first case testing the power of a state to compel a private newspaper to print an article, the Court is asked to approve that power with respect to a reply by a political candidate. For, of all the categories of people in this country, it is difficult to imagine a category more heavily covered by the press, and less in need of government coercion to obtain coverage, than political candidates. As Mr. Justice Harlan observed:

> "For me, it does seem quite clear that the public person has a greater likelihood of securing access to channels of communication sufficient to rebut falsehoods concerning him than do private individuals in this country who do not toil in the public spotlight." *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 70 (1971) (dissenting opinion).

This observation applies with added force to candidates for public office during a political campaign period. During a campaign, the pages of newspapers are filled with news, feature stories and editorial opinion concerning candidates, their personalitities, activities, records, and positions on the issues. And of course campaign coverage is not limited to newspapers. Radio and television stations, local and national magazines, labor union, corporate and other organizational publications, and the candidates' own campaign staffs flood the public with reports, statements, analyses and commentary on all aspects of the campaign. The candidates themselves make speeches, hold rallies, attend meetings and other gatherings— all for the purpose and with the effect of making themselves and their

views known to the public. In *Curtis Pub. Co.* v. *Butts,* 388 U.S. 130, 155 (1967), the plurality assumed that both a football coach and a former Army general, without help from government coercion of the press, "commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able to 'expose through discussion the falsehood and fallacies' of . . . defamatory statements." The same is true, *a fortiori,* of candidates for public office during a political campaign.

Although the Florida Supreme Court sought to uphold §104.38 under the state's power to provide for elections, it cannot seriously be suggested that there is a compelling state need to use coercion to gain public attention for political candidates during an election campaign. Certainly, the record in this case does not show any need sufficient to outweigh the evils of coercon discussed at pp. 17-26, 28-33, *supra.*

The Florida Supreme Court sought support for the decision below in the fact that the number of metropolitan newspapers in the United States has been declining in recent years. In a society whose marketplace of ideas was limited to metropolitan newspapers, that would indeed be a troubling circumstance. Happily, under the protection of the First Amendment, the genius of our people and the progress of technology have expanded our marketplace of ideas far beyond the metropolitian newspaper. Consider that monument to James Madison, the common newsstand. There the consumer of ideas can find, in addition to local metropolitan newspapers, several nationally distributed newspapers and even foreign newspapers, and local and national and perhaps even foreign magazines

of all descriptions. He may also find pamphlets, booklets and paperbound books which, due to technological advances, can now be published so quickly that they are an important source of ideas on even transitory matters of public concern. Beyond the newsstand there are, of course, the so-called "underground" newspapers, pamphlets, etc., which are distributed by individual hawkers, much as metropolitan newspapers were distributed years ago. Moreover, as this Court recognized in *United States* v. *CIO*, 335 U.S. 106 (1948), the publications of labor unions, corporations and other private associations are an important source of political ideas in modern America. Door-to-door distribution of leaflets and similar materials is also a time-honored medium of communication. See, *e.g.*, *Martin* v. *Struthers*, 319 U.S. 141 (1943). Films and theater also contribute to the public stock of "ideas." See, *e.g.*, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501-02 (1952). Finally, the contemporary marketplace of ideas includes perhaps the most ubiquitous and influential media of all, television and radio. In 1970, approximately 95% of American homes—nearly 60 million households—contained at least one television set, and that set was turned on for an average of more than five and one-half hours each day."[14] The present number of sets is undoubtedly significantly larger.

A newspaper is only one communications medium in a vast and diverse array that together constitute an enormous multi-media marketplace of ideas. Today

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[14] See Hearings on H.R. 13721 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 7 (1970) (Statement of FCC Chairman, Dean Burch).

that marketplace is healthy and thriving. The emergence of the underground press, local city-oriented magazines, public broadcasting, and CATV in recent years testify to its dynamism. The decline in the number of metropolitan newspapers testifies to the same effect. As Joseph Schumpeter pointed out, any healthy competitive market will be characterized by a continuous process of "creative destruction", as sellers emerge, expand, contract or disappear in consequence of technological progress and changes in consumer preferences.[15] The disappearance of some metropolitan newspapers reflects not the growing importance of those that remain, but rather the decreasing importance of newspapers as such in the expanding marketplace of ideas as a whole. The decline in the number of metropolitan newspapers reflects not a contraction of the marketplace of ideas, but rather its expansion in other forms—magazines, broadcasting, organizational publications, etc.

Nor can § 104.38's blinkered focus on newspapers be justified on the ground that there is a particular need to compel coverage of local candidates and local campaign issues. Here, too, newspapers have no monopoly position. They compete for attention with local radio stations (of which there are likely to be a dozen or more in many areas), local television stations (commonly, three or more), local magazines, local organizational publications, local hawkers of underground publications, leaflets, handbills, etc., and the communications networks established by candidates themselves and their staffs.

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[15] See J. Schumpeter, Capitalism, Socialism and Democracy, 81-86 (1943).

In sum, the free market of ideas championed by Holmes and Brandeis, see *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *Whitney* v. *California*, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring), is not a romantic myth, but a living, dynamic reality. Today, in 1974, the marketplace of ideas far exceeds, in both size and diversity, anything known to Madison and Jefferson, or even to Holmes and Brandeis. There are far more "sellers" of ideas, and they offer a wider range of wares, than have ever existed in the past.

Certainly, not every new idea or point of view commands an immediate mass audience. But the First Amendment does not itself ordain such instant access,[16] nor does it permit its achievement through government coercion of the print media.[17] Ideas must *earn* success. As Professor Kalven has written:

> "It is an insufficiently noticed aspect of the First Amendment that it contemplates the vigorous use of self-help by the opponents of given doctrines, ideas, and political positions. It is not the theory that all ideas and positions are entitled to flourish under freedom of discussion. It is rather then that they must survive and endure against hostile criticism. There is perhaps a paradox in that the suppression of speech by speech is part and parcel of the principal of freedom of speech.

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[16] *CBS* v. *Democratic National Committee*, 412 U.S. 94 (1973); *Avins* v. *Rutgers*, 385 F.2d 151 (3d Cir. 1967), cert. denied, 390 U.S. 920 (1968); *Chicago Joint Board ACWA* v. *Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), cert. denied, 402 U.S. 973 (1971); *Associates & Aldrich Co.* v. *Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971); *Resident Participation of Denver, Inc.* v. *Love*, 322 F. Supp. 1100 (D. Colo. 1971).

[17] Opinion of the Justices, 298 N.E. 2d 829 (Mass. 1973).

> Indeed, one big reason why policy dictates that government keep its hands off communication is that, in this area, self-help of criticism is singularly effective. . . ." [18]

A system that dispensed with self-help and gave equal or even some automatic access to all ideas would not be a functioning marketplace. It would not foster the competition of ideas, which is the necessary catalyst of intellectual, moral, aesthetic, economic, political and social progress. It would not allocate communications resources in accordance with the expressed needs and wants of the public. It therefore would not serve the public.

The contemporary marketplace of ideas—ranging from *The Daily Rag* to the *New York Times,* from *Muhammed Speaks* to *Ms.,* from *Ramparts* to the *National Review,* and beyond—is open to broad diversity of ideas. And new publications, advancing new ideas, are started all the time. Some gradually win an audience and succeed. Others fail. That is the nature of a *free* and *competitive* market that is alive and functioning well. It is the kind of market contemplated in the First Amendment. It is the kind of market that exists today—without governmental intervention.

2. Section 104.38 Seeks To Vindicate Reputation, Not To Promote Public Debate

The Florida Supreme Court upheld § 104.38 in part because it thought it promoted public debate concerning candidates. That conclusion reflects a superficial analysis of the statute. If the purpose of § 104.38 is

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[18] Quoted in *CBS* v. *Democratic National Committee,* 412 U.S. 94, 153-54 (1973) (Douglas, J., concurring).

indeed to promote public debate about candidates, it achieves that purpose in an arbitrary and irrational manner.[19] Rather, the only purpose that coheres with the provisions of the statute is a purpose to vindicate the reputation of candidates attacked by newspapers. Section 104.38 is an inappropriate vehicle for developing new doctrine concerning access to the media.

If Florida had wanted to promote public debate concerning candidates, the rational approach would have been to encourage or otherwise provide for such debate, without regard to what any particular newspaper had published concerning the campaign. A sampling of methods was discussed at pp. 23-25, *supra*. But § 104.38 does not provide for a minimum quantity of discussion of candidates. Indeed, § 104.38 is of benefit only to the candidate who already has attracted sufficient attention to be attacked by a newspaper. It provides absolutely no benefit whatever to the candidate who has the greatest need of access—the candidate who is totally ignored.

If Florida had wanted to regulate newspapers with a view to ensuring that they provide "fair" campaign coverage, the rational approach (disregarding the First Amendment) would have been to require some rough equality in the treatment of candidates competing for the same office—*e.g.*, roughly equal space, or some kind of equality in editorial treatment. But § 104.38 provides for "fairness" only in a wholly arbitrary way: if a candidate is attacked he is entitled to a reply. He is entitled to a reply even if the newspaper has already

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[19] *Cf.*, *Mills* v. *Alabama*, 384 U.S. 214, 220 (1966), where a state, also asserting a power to provide for fair elections, adopted an irrational regulation of the press.

printed everything that can be said in his defense. If a newspaper does not attack a candidate, but totally misrepresents his positions on the issues, he is not entitled to a reply. Moreover, if the newspaper does not attack a candidate but strongly endorses and praises his opponent for wholly false and fraudulent reasons, the candidate is not entitled to a reply.

If Florida had wanted to promote some rough equality among candidates with respect to media access, it could have drafted a statute that provided access for candidates who need it, but not for candidates who do not. Section 104.38 applies to all candidates willy nilly. It applies to the candidate with a full campaign treasury and easy access to all media, as well as to the candidate with no funds who campaigns in relative obscurity.

Finally, § 104.38 gives a discriminatory advantage to incumbent candidates since it provides for a reply to charges of malfeasance in office and to attacks on official record, but not to attacks on conduct in an unofficial capacity.

This analysis does not show merely that § 104.38 deals with only part of an evil. It shows, rather, that the "evil" at which the statute was directed when enacted in 1913 and continues to be directed is not candidates' lack of access to the news media, but rather the injury to candidates' reputations resulting from press attacks upon them. In attempting to remedy that injury, § 104.38 happens incidentally to provide access in the situation where a candidate is attacked.

As the Florida Supreme Court pointed out, § 104.38 is comparable to a libel retraction statute. The similarity lies in the fact that both types of statute seek to

vindicate an interest in reputation. The operation of each is triggered exclusively by publication of a matter reflecting adversely on a person. But there the similarity ends, and distinctions of constitutional magnitude begin. First, under this Court's decisions, libel retraction statutes can constitutionally apply only to attacks that are false, defamatory, and published with "actual malice" as defined in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), to mean with knowledge of falsity or reckless disregard for truth. Section 104.38 is not so limited. It applies even where the attack on the candidate is true and non-defamatory. Second, libel retraction statutes do not affirmatively require the publication of a retraction. They merely provide that *if* a retraction is published the damages that may be recovered for the original libel are reduced in some way.[20] Section 104.38, by contrast, affirmatively requires the publication of a reply. Because of these two important distinctions, the constitutional analysis of a mandatory right-of-reply statute like § 104.38 is quite different from the analysis of a retraction statute. For example, a retraction statute would have none of the adverse effects on press independence discussed at pp. 17-23, *supra.*

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[20] Florida has a typical libel retraction statute, which provides:

"770.02 Correct, apology, or retraction by newspaper

If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case shall recover only actual damages."

If § 104.38 were limited to apply only to false and defamatory attacks published with actual malice in the constitutional sense, this case would present the interesting question whether a state may provide for a mandatory right of reply as an alternative to damages as a remedy for libel. Since § 104.38 is not so limited that question is not presented. The question that is presented is whether Florida can provide a mandatory right of reply as a remedy to vindicate reputation against a published attack that is itself constitutionally protected. Under the *New York Times* line of cases,[21] a state may not award damages to vindicate a political candidate's reputation against constitutionally protected attacks. *A fortiori*, a state should not be permitted to trespass even further upon the editorial freedom of the press by requiring a newspaper to print a reply in order to vindicate reputation against a constitutionally protected attack.

3. The Premises of the Fairness Doctrine in Broadcasting Have No Application to the Print Media

The Florida Supreme Court sought support for its decision below in an analogy to the fairness doctrine in broadcasting, which this Court upheld in *Red Lion*

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[21] See *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); *Henry* v. *Collins*, 380 U.S. 356 (1965); *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966); *Curtis Pub. Co.* v. *Butts*, 388 U.S. 130 (1967); *Associated Press* v. *Walker*, 388 U.S. 130 (1967); *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81 (1967); *St. Amant* v. *Thompson*, 390 U.S. 727 (1968); *Greenbelt Coop. Pub. Ass'n* v. *Bresler*, 398 U.S. 6 (1970); *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265 (1971); *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971); *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295 (1971); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971). See also *Linn* v. *Plant Guard Workers*, 383 U.S. 52 (1966); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *Pickering* v. *Board of Educ.*, 391 U.S. 163 (1968).

Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969). However, the considerations which led this Court to approve the fairness doctrine in the context of broadcasting have no application to the print media, as the Court recognized in *Red Lion* and in *CBS* v. *Democratic National Committee*, 412 U.S. 94 (1973).

The First Amendment analysis in *Red Lion* began with the proposition that a broadcast "licensee has no constitutional right to be the one to hold the license." 395 U.S., at 389. Of course, no scheme of licensing of any sort could possibly be applied to the print media. Licensing of the press is the oldest, most fundamental abuse of freedom of expression which the English-speaking peoples have experienced. Milton hurled the thunderbolts of *Aeropagitica* against it. Schemes of prior control of the print media not amounting to the kind of systematic licensing applied to broadcasting have been roundly condemned by this Court. See, *e.g.*, *Near* v. *Minnesota*, 283 U.S. 697 (1931); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971).

The reason why licensing is constitutionally acceptable in broadcasting derives from the unique technology of that medium:

> "When two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communicatons if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is incomparably greater than the range of the human voice and the problem of interference is a massive reality. The lack of know-how and equipment may keep many from the air, but only a

> tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had . . . .
>
> It was this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished which made necessary the enactment of the Radio Act of 1927 and the Communciations Act of 1934 . . . . [I]t was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few." 395 U.S., at 387-88.

Of course, nothing remotely comparable to this clear technological necessity exists in the field of print communications. Consequently, there is absolutely no possible basis for the Government ever to tell a publisher that he may not publish because there is "room for only a few."

From the fact that the Government chooses which applicants shall have a license to broadcast, certain obligations attach to a broadcasting license. Where the Government confers an exclusive power, it may, and in some circumstances must, condition the power so that it is exercised in a manner that protects the legitimate interests of those excluded from the power and those affected by it. *See, e.g., Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192 (1945) (duty of fair representation). As the Court held in *Red Lion*:

> "A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself

as a proxy or fiduciary with obligations to present those views and voices which would otherwise, by necessity, be barred from the airwaves.

". . . Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.

"Rather than confer frequency monopolies on a relatively small number of licensees, . . . the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week." 395 U.S., at 389-91.

The very premise of the imposition of this duty to share—receipt of monopoly from the Government—is totally inapplicable to the print media. They do not receive their right to print from the Government. It is an inherent right of the people, protected against governmental abridgment by the First Amendment. No such constitutional protection attaches to broadcasting: "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." 395 U.S., at 388.

These considerations underlying the unique constitutional tolerance of governmental licensing and regulation of broadcasting were reaffirmed in *CBS* v. *Democratic National Committee,* 412 U.S. 94 (1973), where the Court held that there is no First Amendment right to purchase broadcasting time for public issue messages. The Court again underscored the unique characteristics of the broadcast media. 412 U.S., at 101. See also, 412 U.S., at 184 (Brennan, J., dissenting).

The Court noted "the reality that in a very real sense listeners and viewers constitute 'a captive audience,' " 412 U.S., at 127, whereas readers are not, 412 U.S., at 128. The plurality decisively distinguished the constitutional position of a newspaper published from that of a broadcast licensee:

> "The tensions inherent in such a regulatory structure emerge more clearly when we compare a private newspaper with a broadcast licensee. The power of a privately owned newspaper to advance its own political, social and economic views is bounded by only the two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers. A broadcast licensee has a large measure of journalistic freedom but not as large as that exercised by a newspaper. A licensee must balance what it might prefer to do as a private entrepreneur with what it is required to do as a 'public trustee.' " 412 U.S., at 117-18.

Mr. Justice Brennan and Mr. Justice Marshall, dissenting, were of the same view. See 412 U.S., n.12 at 182.

In light of the basis on which *Red Lion* was decided, there can be no reasoned extension of that decision to the imposition on newspapers of a duty to print. Indeed, the reasoning of both *Red Lion* and *CBS* makes clear that no such extension is possible. The fairness doctrine is an outgrowth of technological conditions peculiar to broadcasting; those conditions provide its sole constitutional justification. No such conditions are present in the field of print communications.

The Florida Supreme Court spoke loosely of "monopoly" conditions justifying imposition of a duty to print. Even if such a monopoly existed and violated the

antitrust laws, there would be no justification for imposing a duty to print: for the monopoly would not be technologically determined, and anyone with a printing press or a mimeograph machine could enter and compete and spread his ideas as far as their merit would carry them. But there is no such monopoly of communications, as we showed at pp. 34-39, *supra*. Moreover, the application of § 104.38 is not limited to monopolists.

Finally, there is nothing in the technology of print communications remotely analogous to the conditions in broadcasting. New newspapers, new magazines, new books, new pamphlets are published every year. It is true that there is no significant expansion, and indeed some contraction, in the number of large metropolitan newspapers. But there is nothing to show that the contraction results from technological factors rather than simple consumer preferences for other media, both in broadcasting and in print.[22]

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[22] Certainly the fact that newspapers benefit from second-class postage rates, 39 CFR § 132, and from a limited antitrust exemption, 15 U.S.C. §§ 1801 *et seq.*, does not make newspapers a part of government and as such subject to the Equal Protection Clause and to a fairness doctrine as an element thereof. See *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972). If newspapers *were* subject to the Equal Protection Clause, they would be required to do far more than merely print the replies of criticized political candidates. They, like all other governmental forums, would have to give equal access to everyone who seeks it. The editorial freedom and independence of newspapers would totally vanish as they became common carriers for all ideas seeking a ride. Perhaps not *all* ideas—for, as agents of the state, newspapers probably could not advance religious, partisan or discriminatory ideas. Plainly, this is not what the First Amendment contemplates. See *CBS* v. *Democratic National Committee*, 412 U.S. 94, 142-43 (1973) (Stewart, J., concurring); *id.*, 149-50 (Douglas, J., concurring).

4. Approval of § 104.38 Would Not Promote Free Debate, But Restrict It

Professor Emerson has written:

> "[A]ny effort to solve our broader problems of a monopoly press by forcing newspapers to cover all 'newsworthy' events and print all viewpoints, under the watchful eyes of petty public officials, is likely to undermine such independence as the press now shows without achieving any real diversity." T. Emerson, The System of Freedom of Expression, 671 (1970).

Statutes like § 104.38 might well destroy publications whose success depends on appealing to a select readership with a particular approach or point of view. In this country, there are newspapers of the right, and newspapers of the left (old left, new left, and just plain left), newspapers that are moderate, and newspapers that are inflammatory. The First Amendment makes room for them all. If each is now required to "balance" its news coverage and editorial position by printing opposing points of view, the diversity among them will certainly diminish, and may in some cases disappear altogether. The diversity and breadth of public debate will be the chief victim.[23]

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[23] In *Brandywine-Main Line Radio, Inc.* v. *FCC*, 473 F.2d 16 (D.D.C. 1972) cert. denied, 412 U.S. 922 (1973), the FCC denied renewal of a radio license, in part because of violations of the fairness doctrine. The court affirmed. Judge Bazelon, dissenting, pointed out: "WXUR was no doubt devoted to a particular religious and political philosophy; but it was also a radio station devoted to speaking out and stirring debate on controversial issues. The station was purchased by Faith Theological Seminary to propagate a viewpoint which was not being heard in the greater Philadelphia area. . . . The Commission's strict rendering of fairness requirements . . . has removed WXUR from the air. This has deprived the listening public not only of a viewpoint but also of

Statutes like § 104.38 would introduce petty administrators and court officers into the editorial offices of newspapers. For they would be accompanied by regutions, investigations and injunctions. Newspaper copy might have to be cleared with officials to determine whether it gives rise to a right of reply. Other copy might have to receive official clearance under statutes, ordinances, rules, regulations, orders and injunctions requiring that newspaper articles and editorials be "fair" or "balanced" or "present both sides."

Certainly under the regime of the fairness doctrine and similar requirements, broadcasting has, as a practical matter, been restricted to presentation of a relatively small range of reasonably moderate points of view. Certainly, broadcasting does not reflect the full range of opinion and ideas that can be found in the print media. Nor, under the regime of the personal attack aspect of the fairness doctrine, see generally *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969), have the broadcast media developed a record of crusading journalism and exposure of corruption, fraud, and other wrongdoing remotely comparable to the record of the print media.

The concerns expressed here are not idle. Senator McClellan has already indicated on the floor of the Senate that if this Court upholds § 104.38 he will introduce similar federal legislation.[24] Affirmance in this

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robust debate on innumerable controversial issues. It is beyond dispute that the public has *lost* access to information and ideas. This is not a loss to be taken lightly, however unpopular or disruptive we might judge these ideas to be." 473 F.2d, at 69-70.

[24] 120 Cong. Rec. S1105 (daily ed., Feb. 4, 1974).

case would signal to governments at all levels throughout the country that it is open season on the press.

If a statute like § 104.38 were extended to magazines, which have never been thought to have a constitutional status different from that of newspapers, the resulting standardization of the formerly free press would be even more striking. Magazines such as *The New Republic, I. F. Stone's Weekly, Ramparts, The Public Interest,* and *The National Review* simply could not exist as we have known them. Whether they, or smaller publications having similar appeals, could exist at all is doubtful.

Mr. Justice Brandeis warned: "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead* v. *United States,* 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting). Even the wealthiest and most independent newspapers cannot and will not for long print double editions—the edition they want to print plus the edition the government tells them they must print. In the face of such a requirement, newspapers will inevitably blunt their swords and use them sparingly. Public debate will not have been promoted, but restricted. The vigorous canvassing of the merits of public men, to which Madison proudly referred, will not be a continuing reality, but will have become an historical curiosity.

II. UNDER THE FIRST AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, § 104.38 IS UNCONSTITUTIONALLY VAGUE

Statutory terms critical to the effective scope of § 104.38 are vague, and have not been defined by the Florida Supreme Court.

The statute protects a "candidate." But who is a candidate? Is a politician who has not formally announced his candidacy but who is actively seeking support and contributions a "candidate" entitled to the protection of § 104.38? Is a politician who is not actively seeking support, but who is "testing the wind" a "candidate"? Is a person for whose nomination a "draft" movement exists a "candidate"? Or a person who has announced his candidacy but has not met the legal qualifications for candidacy?

Section 104.38 applies when a newspaper anywhere in its columns "assails the personal character" of a candidate or "charges said candidate with malfeasance or misfeasance in office" or "otherwise attacks his official record." What is an assault on personal character? What is a charge of malfeasance? What is an attack on an official record? Does the statute apply to a news article reporting that a legislator seeking re-election failed to vote on certain matters? or had dinner with a lobbyist? or accepted a contribution from a special interest? or votes on matters affecting his own private business interests? or failed to file income tax returns? or is the recipient of an agricultural subsidy? or was arrested for a traffic violation? In the case of a governor seeking re-election, does § 104.38 require the printing of a reply to a news article analyzing deficiencies in state programs during his administration? or reporting that several of his close associates have received special favors from the state, or have been

indicted? Does it apply to an article quoting inconsistent statements on the issues which a candidate has made during the course of a campaign? Does it apply to an article reviewing previous public statements a candidate has made and which are now an embarrassment to him? Does it apply to a statement that Black leaders regard him as a racist, or that influential businessmen regard him as soft on communism? Does it apply to the principal statement in this case: that a candidate while serving as a union leader violated a no-strike law?

Section 104.38 applies only to newspapers. It clearly applies to large metropolitan daily newspapers of general circulation. Does it also apply to small weekly newspapers? Does it apply to monthly publications printed on newsprint? Does it apply to trade or organizational publications? To newsletters?

What is a "reply" that must be printed under § 104.38. The Florida Supreme Court did hold that the statutory term "any reply" refers only to replies that are "wholly responsive to the charge made in the editorial or other article in the newspaper being replied to and further that such reply will be neither libelous nor slanderous (sic) of the publication nor anyone else, nor vulgar nor profane." But the term "responsive" provides no reasonable guidance to editors, whose view of what is "responsive" may be quite different from a candidate's.[25]

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[25] In the instant case, for example, it is far from clear that Mr. Tornillo's proposed replies are responsive to *The Miami Herald's* criticism of him. Each reply consists in large part of a recitation of good deeds on the part of the labor union which Mr. Tornillo headed. It is strongly arguable that these lists have no relevance to the substance of the criticism, which was that Mr. Tornillo defied state law by leading a teachers' strike.

If § 104.38 should be widely invoked during the heat of a political campaign, these will become serious practical problems for newspapers. The uncertainties can be removed in three ways—by piecemeal litigation, probably in the form of temporary restraining order or preliminary injunction proceedings during the campaign; by an army of petty officials giving advisory opinions on what a newspaper may "freely" print (subject, of course, to judicial review); or by efforts on the part of newspapers to steer far wide of the statute's scope in their news articles and editorials *Cf. Speiser* v. *Randall,* 357 U.S. 513, 526 (1958).

This Court on many occasions has condemned statutes and other laws that regulate speech by terms that are of vague and uncertain meaning. See, *e.g., Herndon* v. *Lowry,* 301 U.S. 242 (1937); *Winters* v. *New York,* 333 U.S. 507 (1948); *Cramp* v. *Bd. of Public Instruction,* 368 U.S. 278 (1961); *Baggett* v. *Bullitt,* 377 U.S. 360 (1964); *Ashton* v. *Kentucky,* 384 U.S. 195 (1966). As Mr. Chief Justice Hughes wrote for the Court in *Stromberg* v. *California,* 283 U.S. 359, 369 (1931):

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment."

The vices of vagueness are too well known to require restatement here.

It suffices here to note that § 104.38 carries both criminal and civil sanctions; that it regulates speech concerning political candidates, their official records and qualifications for public office; that there are no expeditious means for eliminating the statutory vagueness; and that this Court's standards for statutory clarity apply with particular force, under the decisions just cited, to regulations of this character. In these circumstances, § 104.38 is unconstitutionally vague.

III. SECTION 104.38 TAKES A NEWSPAPER'S PROPERTY WITHOUT COMPENSATION, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Where § 104.38 applies, it requires that a newspaper give space in its columns to a political candidate for a reply. Neither the state nor the candidate pays the newspaper any compensation whatever for the space occupied by the candidate's reply. Under prior decisions of this Court § 104.38 takes private property —the newspaper space—without compensation, in violation of the Due Process Clause of the Fourteenth Amendment. [26]

The decisions of this Court on when state action constitutes a "taking" for which compensation must be paid are not easily reconciled. See, *e.g.*, Sax, *Takings and the Police Power*, 74 Yale L.J. 36 (1964); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967). But the clearest case of a taking, and one about which there has been no disagreement, is that where the state physically occupies the private property, and ousts the owner from

[26] The Florida Supreme Court considered and rejected this claim.

it. See, e.g., *Pumpelly* v. *Green Bay Co.*, 13 Wall. (80 U.S.) 166 (1871); As Professor Michelman has written, "The one incontestable case for compensation (short of formal expropriation) seems to occur when the government brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership." 80 Harv. L. Rev., at 1184.

In this case, § 104.38 authorizes candidates' replies to physically occupy newspaper space which previously was under private ownership. That space has very significant economic value, whether for news articles or for advertising.

Thus, under § 104.38 the State of Florida, through its designee, the political candidate, plants its flag in the column space of a privately owned newspaper. The appropriation of that space is as much a taking of property, as would be the similar appropriation of land or of any other business man's stock in trade. Section 104.38 presents the paradigm case of a taking of private property without compensation. See *Delaware, L. & W. R. Co.* v. *Town of Morristown*, 276 U.S. 182 (1928), where the Court held that the town had "taken" railroad property when it declared railroad land reserved for a private taxi stand to be open to all taxis, even though the railroad, as a common carrier, owed its passengers a duty of providing a suitable way to reach and leave the station, and even though the railroad's taxi stand was generally subject to the town's police power. Since a newspaper is not a common carrier, the instant case is *a fortiori*.

In some cases, this Court has held that an injury to a property interest resulting as an incidental consequence of a generally valid regulation was not a taking requiring payment of compensation. See, *e.g., United States* v. *Central Eureka Mining Co.*, 357 U.S. 155 (1958); *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962). But § 104.38 is not a general regulation which incidentally has an adverse effect on newspaper property. Its sole purpose is to take newspaper property and give it to someone else. Section 104.38 cannot be analogized to a regulation that broadly bans certain activities and thereby incidentally diminishes the value of certain property previously devoted to those activities, see, *e.g., Mugler* v. *Kansas*, 123 U.S. 623 (1887). Section 104.38 does not ban the use of the newspaper space it affects; rather, it wholly divests the newspaper of its right to the use of the space and revests that right in a political candidate. The regulatory statutes approved by this Court have not operated in this way.

Moreover, the regulatory statutes generally were directed at uses of private property which were thought to be in some way "noxious" or otherwise adverse to the rights of others, see, *e.g., Mugler* v. *Kansas, supra; Miller* v. *Schoene*, 276 U.S. 272 (1928); *Fertilizing Co.* v. *Hyde Park*, 97 U.S 659 (1878); *Gardner* v. *Michigan*, 199 U.S. 325 (1905), or were so broad in scope and the economic consequences so massive and widespread that the effect on any individual property holder was truly incidental in comparison to the whole and a requirement to pay compensation to all would have made impossible a highly beneficent public project, see, *e.g., Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). But

§104.38 does not regulate a "noxious" use of newspaper space—a newspaper's exercise of its constitutional right to criticize a candidate for public office can hardly be so characterized. Nor is the statute so broad in scope that the effect on newspapers as a class or on any given newspaper is merely incidental—the statute is directed exclusively at newspapers. Nor would a requirement of compensation to be paid by the state or by the candidates make a reply statute impossible of execution as a practical matter.

To the extent that diminution of the economic value of the affected property is a criterion for deciding whether a taking has occurred, see, *e.g., Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922), it is satisfied here. The economic value to the newspaper of the space occupied by the reply pursuant to § 104.38 is totally destroyed. That the remander of the newspaper is unaffected is no more relevant than is the fact that if the government takes half a man's land for a post office he retains the other half. Compensation must be paid for what has been taken.

The fact that § 104.38 may serve a public purpose has no effect on a claim for just compensation. As Mr. Justice Holmes wrote for the Court in *Pennsylvania Coal Co.* v. *Mahon, supra,* at 415-16, "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." And as the Court said in *Armstrong* v.

United States, 364 U.S. 40, 49 (1960), "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." If, as contended, § 104.38 does serve the public purpose of educating the electorate, the cost should be borne by the public (or by the political candidates particularly benefitted), not by newspapers.

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the decision of the Florida Supreme Court should be reversed and the case remanded with directions to reinstate the judgment of the Circuit Court for Dade County dismissing the Complaint.

Respectfully submitted,

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November 1, 1973

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Tornillo, Jr. v. *The Miami Herald*

Dear Mr. Cooper:

In response to your request, pursuant to Rule 41(1) of the Rules of the United States Supreme Court, on behalf of the Miami Herald, we hereby consent to the filing in that Court of an Amicus Curiae Brief in this case by the Washington Post Company.

Sincerely,

/s/ JAMES W. BEASLEY
James W. Beasley

JWB:mh

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Re: Tornillo v. Miami Herald

Dear Mr. Cooper:

As counsel for the above captioned respondent, you are hereby given permission to file your brief amicus curiae on behalf of the Washington Post in the above captioned matter.

Very truly yours,

/s/ TOBIAS SIMON
Tobias Simon

TS:kk

Certificate of Service

I hereby certify that three printed copies of the foregoing Brief of the Washington Post Company, Amicus Curiae, in Support of Reversal, were mailed, first-class air mail, postage prepaid, this 28th day of February, 1974, to each of the following:

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/s/ TERRY M. ROSE
Terry M. Rose

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of Knight Newspapers, Inc.,
Appellant,

v.

PAT L. TORNILLO, JR.,
Appellee.

On Appeal from the
Supreme Court of Florida

BRIEF OF DOW JONES & COMPANY, INC. AND THE NEW YORK TIMES COMPANY, AS AMICI CURIAE

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INTEREST OF THE AMICI

Dow Jones & Company, Inc., a Delaware corporation, and The New York Times Company, a New York corporation, pursuant to the written consent of both parties to this action, hereby submit this joint brief, as *amici curiae.*

Dow Jones & Company, Inc. is the publisher of, inter alia, *The Wall Street Journal,* a general newspaper empha-

sizing matters affecting business and finance, with a nationwide daily circulation in excess of 1,250,000; *The National Observer*, a general weekly newspaper with a national circulation of over 500,000; the Ottaway Newspapers, twelve independently edited local newspapers in six states with combined daily circulation in excess of 250,000; and *Barron's National Business and Financial Weekly*, a magazine concentrating on material of interest to the business and financial community, having a weekly circulation of about 200,000.

The New York Times Company is the publisher of *The New York Times*, a daily newspaper with nationwide distribution and with a daily circulation of about 850,000 and a Sunday circulation of about 1,500,000. In addition, the New York Times owns ten newspapers in the State of Florida, with a combined total circulation of about 110,000.

The *amici* are thus two of the broadest and largest publishers of printed media in the United States. This joint brief, as *amici curiae*, is being filed because each of the *amici* is convinced that the decision of the Supreme Court of Florida, if allowed to stand by this Court, will sharply curtail the discussion by newspapers of political and governmental affairs in the State of Florida, and will permit and encourage governmental regulation of the content of printed media to a degree totally inimical to rights guaranteed under the First and Fourteenth Amendments of the Constitution of the United States.

ARGUMENT

Florida Statute § 104.38, held constitutional by the Florida Supreme Court in this case, provides in substance that if "any newspaper in its columns assails the personal character" of a candidate or charges him with "malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose,"

the newspaper must upon request "publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to." The Florida Supreme Court reasoned from the premise that the statute encourages, rather than limits, "robust dissemination of ideas and counterthought." Inasmuch as such encouragement is an object of the First Amendment guarantees, the Court concluded that the statute was constitutional. The Court's premise is clearly wrong. In our view, a careful consideration of the statute's implications strongly suggests that the result of its enforcement will in fact be a sharp limitation on the transmission by the press of information and opinion about Florida politics and government.

The scope of the Florida statute is ambiguous; whether, for example, it applies to news "columns" and signed "columns," or only to editorial "columns" is unclear.* Regardless of its interpretation, however, if the Florida statute is finally determined to be valid, every Florida newspaper editor will be required to pause before publishing material concerning any political personage who may be deemed to be a "candidate." He will necessarily consider each sentence, each phrase, each implication, in an attempt to divine whether a court might construe the language to be "assailing" the candidate's character or charging him with misfeasance or malfeasance. Every politically oriented editorial or letter to the editor will be published with the fear that, as a result of its publication, part of the content of tomorrow's editorial page will be dictated by a politician seeking office. Every page-one story about legislators or other elected officials may carry with it the possibility that the legislator or official will be the author of a portion of a

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* The ambiguities in this criminal statute are numerous and are such as to be unconstitutionally vague. Courts may not cure such an infirmity by judicial construction. *See, e.g., Ashton* v. *Kentucky*, 384 U.S. 195 (1966).

future front page. It is painfully clear that those conditions will lead not to debate, but to a stifling degree of restraint in political reporting by newspapers. Such government-caused self-censorship, particularly in the area of expression about government and politics, is plainly unconstitutional in its effect. *See, e.g., Rosenbloom* v. *Metromedia*, 403 U.S. 29, 52-53 (1971); *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964).

The *amici* respectfully submit that the error of the Supreme Court of Florida is fundamental and goes beyond its holding with respect to the onerous requirements of this particular Florida statute. The very core of the First Amendment protection of the press is that the government may not forbid a member of the press to publish what it believes should be published, and may never force a member of the press to publish what it concludes should not be published. If it is constitutional for a legislature or court in the "public interest" to tell the press what kinds of election news it must publish, what is to prevent such bodies from dictating what must be published in other public or political areas and thus, what "freedom" to publish will remain? The legislature and Supreme Court of Florida have told the Miami Herald that it must publish the appellee's statement; this the First and Fourteenth Amendments forbid them to do.

The Florida court's holding is contrary to the recent decisions of other courts throughout the country. In *Associates & Aldrich Co.* v. *Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971), the Court of Appeals held that the defendant was not required to carry an advertisement for a motion picture where the newspaper disapproved of the text of the ad. The court said:

> "Appellant has not convinced us that the courts or any other governmental agency should dictate the contents of a newspaper." 440 F.2d at 135.

In *Chicago Joint Bd., Amal. Cloth. Wkrs.* v. *Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), the Court of Appeals held that newspapers were not required to take advertising explaining a union's position with respect to the sale of imported clothing by a large department store. Quoting the District Court, the Seventh Circuit said:

> " '[T]he function of the press from the days the Constitution was written to the present time has never been conceived as anything but a private enterprise, free and independent of government control and supervision. Rather than state power and participation pervading the operation of the press, the news media and the government have had a history of disassociation.' " 435 F.2d at 474.

Seven months ago, the Supreme Judicial Court of Massachusetts, in an advisory opinion to the State legislature, held that a proposed statute requiring newspapers that publish advertisements for political candidates to publish paid advertisements for competing candidates would be unconstitutional. *Opinion of the Justices to the Senate* ____ Mass. ____, 298 N.E.2d 829 (1973). The Court observed that the proposed legislation

> "presents a paradox because its enactment, instead of achieving a fairer dissemination of political advertising, may produce the chilling effect of discouraging newspapers and other affected publications from accepting any political advertisements. A newspaper or other publication of general circulation may decide to publish no political advertisements on an election issue rather than expose itself to a commitment to publish all responsive advertisements." 298 N.E.2d at 833-834.

The Court concluded that the statute was unconstitutional because the

> "compulsion to publish all responsive political advertisements, applicable to all newspapers and other pub-

> lications of general circulation in the Commonwealth, goes beyond what is essential to the furtherance of any interest of a State in its citizens having a right of access to newspapers in order to express, at their expense, political ideas which otherwise would not be published. . . . Indeed, no set of circumstances may exist which would support a legislative mandate that a newspaper or other publication of general circulation must publish a political advertisement." 298 N.E.2d at 835.

And last term, in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94 (1973), Mr. Chief Justice Burger writing for this Court said:

> "The power of a privately owned newspaper to advance its own political, social and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers." 412 U.S. at 117.

In *Pittsburgh Press Co.* v. *The Pittsburgh Commission on Human Relations,* 413 U.S. 376, 391 (1973), this Court reaffirmed unequivocally to the press "the protection afforded to editorial judgment and the free expression of views . . . [on] issues, however controversial."

Also, see *Mills* v. *Alabama,* 384 U.S. 214 (1966), in which this Court underscored the constitutional right of newspapers to "urge people to vote one way or another in a publicly held election." 384 U.S. at 220.

The *amici* are committed to a system which fosters dissemination of expression by all elements of society. Editorially, they have published in the pages of their newspapers information from many sources and a multitude of viewpoints which vary from those held by their publishers

and editors. But while they believe in the robust debate of which the Florida court speaks, they are convinced that in the long run the heavy hand of the government will stifle, not encourage, such discourse.

In our view this statute undermines the function of the press in our democratic society, which function was cogently described in *Mills* v. *Alabama, supra,* 384 U.S. at 219:

> " . . . [T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free."

The predicate to obtaining and protecting free and open discussion of matters of legitimate public interest and concern, as recognized in the opinions referred to above, is the prohibition of federal and state governments from ordering what shall be published by the press. The writers of our Constitution explicitly recognized this when they chose, as their sole means of insuring a system based upon the free exchange of ideas, the command:

> "Congress shall make no law . . . abridging the freedom . . . of the press . . . ."

The rampart between the press and the overwhelming powers of government must not be breached. Once the government is within the gates, no matter what its motivation or pretext, it may never be removed.

CONCLUSION

It is respectfully urged that this Court reverse the decision of the Florida Supreme Court.

Respectfully submitted,

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February 27, 1974

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief of Dow Jones & Company, Inc. and The New York Times Company, as *Amici Curiae,* have been served on this 27th day of February, 1974, upon the attorneys for the parties and for *Amici Curiae* by depositing same in a wrapper, postage prepaid, in a depository of the U. S. Postal Service, addressed as follows:

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FILE COPY

In the Supreme Court of the United States

Supreme Court, U.S.
FILED
MAR 4
MICHAEL RODAK, JR.

NO. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of
KNIGHT NEWSPAPERS, INC.,

Appellant,

vs.

PAT L. TORNILLO, JR.,

Appellee.

On Appeal from the Supreme Court of Florida

BRIEF OF AMICUS CURIAE ON BEHALF OF PUBLISHERS OF THE FOLLOWING FLORIDA NEWSPAPERS: *TODAY*, TITUSVILLE *STAR ADVOCATE*, MELBOURNE *EVENING TIMES*, FT. MYERS *NEWS-PRESS* AND PENSACOLA *NEWS-JOURNAL*

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in the
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INTEREST OF AMICUS CURIAE

The interest of undersigned amicus curiae exists by reason of the effect of the statute in question, Florida Statutes Annotated 104.38 (Appendix A), upon the relatively small newspapers represented in this brief, and the bearing that this effect has upon the unconstitutionality of said statute. This amicus curiae supports the position taken by Appellant, The Miami Herald Publishing Company, and concurs in its brief on the merits.

ARGUMENT

The crucial constitutional defect of the statute in question is the mandatory requirement upon Florida newspapers to publish "any reply" immediately upon the request of a candidate whose character is assailed, whose record is attacked, etc. There are other problems of vagueness and arbitrariness in the statute, but this mandatory requirement is a direct assault upon press freedom. The political function of newspapers is greatly reduced by this statute, especially small newspapers. The economic considerations, the cost of compliance, to the small newspaper, are a distinct factor in the mind of the editor who has to decide whether to publish a political criticism in the light of the statutory mandate. If he publishes ten inches against a candidate, he must immediately publish, free of charge, ten inches of any writing furnished by that candidate. Should he have to suffer this constant threat under the free press idea?

We do not intend to review law which has already been ably presented. The statute, which is quite old, historically has not been enforced, and has been held unconstitutional in

lower court decisions which were not challenged. State v. News Journal, 36 Fla. Supp. 164 (Volusia County, Fla. 1972). The statute was never considered much of a problem until the ruling of the Supreme Court of Florida, challenged by Appellant, The Miami Herald Publishing Company. Policies of newspapers to publish opposing views may account for the lack of attention to this statute but we submit that equally responsible would be the obvious defects in the statute. A layman reading the statute could see its impossibility of implementation. Every line of the statute has implementation and vagueness problems. The "any reply" phrase is an obvious defect and a thoughtful American layman would recognize it.

The largeness of the newspaper, THE MIAMI HERALD, stressed by the Supreme Court of Florida, cannot be the point of our problem. The United States has not yet come to the point of exchanging governmental control for laissez-faire in the newspaper world. By stressing the largeness or monopoly factor, the Supreme Court of Florida has forgotten the idea of a Fourth Estate, free and independent. The weak confession and avoidance statement in the opinion of the Supreme Court of Florida, attempting to clarify "any reply" as not intended to include libelous or obscene material, illustrates the forgetfulness of the Florida Supreme Court. The decision is a forgetting that the courts are an arm of the government, and that what is libel and what is obscenity depends upon the courts. An editor can read the volumes of opinions on what is libel and what is obscenity and still not know what to do. But the point of this writer is that the decision exchanges governmental control for press freedom. So not only does the editor fear to publish his own political comments about a political candidate, but he fears to interpret "any reply". He is therefore doubly prevented psychologically from freely publishing his views. It is simple. Only a court can decide

whether some reply should have been published. And so the judgment of courts is substituted for the judgment of newsmen.

In this day of Solzhenitsyn's reminders of Siberia, how can we in Florida afford to backslide on the major constitutional freedom? The big business argument must be abandoned unless we rewrite the Constitution to eliminate press freedom and substitute administrative regulation.

The economic factor is not the only difference of application of the statute respecting small newspapers. It is well known that small-town newspapers are close to their people and play a great role in reflecting the attitudes and political positions of the people. Small-town newspapers have great strength as instruments of expression and reflection of public opinion in local politics; and perhaps as instruments of forming political opinion. The decision challenged here tends to reduce the impact of the small-town newspapers in local politics, because of restraint by editors. This is clearly opposed to the free press doctrine of this country. The punch of a small newspaper in a small town is surgically removed by enforcement of this statute. An editor will be discouraged from printing an editorial about a political candidate which contains strong statements about the candidate.

Enforcement of the statute in question, as we have said, greatly reduces or eliminates the political function of a newspaper during elections. But looking ahead, doesn't the statute also open the way for administrative governmental publications, "public relations" organs of governmental agencies, to tell the people what they should do? The way is open for governmental control of political opinion. Governmental control is more to be feared than business monopoly. Monopoly, after all, is economically subject to antitrust regulations.

On a smaller scale we can see that a newspaper might delay making statements until the eve of an election. Granted, a conscientious editor would not do this, but the temptation would nevertheless be present. Again on a smaller scale, we submit that the publication of a newspaper during an election becomes the publication of charges and replies. Persons with no conceivable chance of election, persons tending towards mental incompetency, can qualify as candidates and obtain the same power over the press as bona fide candidates. Designing persons could use the statute in question to neutralize the newspaper's role. An incumbent could demand a reply to every critical comment, every disparaging letter to the editor, and every opposition advertisement. The issue of prominence of the reply opens a variety of litigious problems.

To the chilling effect of all of the above, we add the threat of immediate suit for injunction. Knowledge of this threat constitutes a restraint upon the press. The newsman knows he can be imprisoned for a mistake in judgment. Is not this, therefore, retrogressive law, fraught with danger to a reportedly free society?

The state is telling the newspaper what to print, and this is the rub. A large newspaper, assuming enough newsprint, might afford to go ahead and state its views and take a chance on plenty of space and newsprint for the replies. But a small newspaper would not have even this much latitude.

Assume a situation in a town where a stranger comes in and introduces himself into society as a professional person, and enters into politics. Assume he runs for a position on the local Democratic or Republican committee, and the newspaper discovers that he has a criminal record, that he is associated with vice or near-vice activities in other parts of the state or

country. Obviously, the newspaper's duty during the election is to print this information. Obviously, it is an assault upon the man's character, and so his reply, any reply by him, must be published. Every time the newspaper says anything about him, he can reply and it will be published. Will this eliminate the newspaper as a crusader for truth, and for enlightenment of the electorate? And what about the person who wishes to exploit, for some perverted reason, his unsavory past? He can do this. He can say, "I stole that money, but I stole it for a good reason," and he can go on and explain and dramatize his past, similarly to Curley of Boston and others. Consider the result of this statute if a person of the status of former Vice-President Agnew should move to a Florida community and enter into politics. Every recital of historical data concerning his plea of guilty and his resignation would entitle him to publication of his own arguments without end.

Everyone knows how newspapers depend upon wire service dispatches. Strong cirtical material comes through wire services, including the columns of Jack Anderson and similar columns. Should a newspaper fear to publish these columns during an election? The statute in question does not except presidential elections. It appears quite clearly that the publication of a Jack Anderson column criticizing a presidential candidate could result in mass replies in all Florida newspapers publishing the Anderson column.

What of the exposing of hoaxes, such as the Segretti letters about Senators Muskie and Jackson? Is it too far-fetched to speculate that the candidate under whose banner the letters were written, could freely enter the columns of the newspaper exposing the hoax? Photographs raise a completely new problem in themselves. What standard exists for the reply to a photograph?

Implementation of the statute in question in the wake of a Watergate scandal horrifies the fertile mind. The candidate whose record would be criticized would be vested with endless controls over the crusading newspaper. If there was ever a time in which a free press is needed and justified, it is now and in the foreseeable future. Freedom to criticize political candidates, unfettered by this statute, is essential to the restoration of political health. We have not come so far from the Peter Zenger trial that the State can now weave a mesh of restrictions on the press unforeseen by our revolutionary forefathers, and not contemplated in the United States Constitution.

It is not our intention to digress too far from our main thrust, that is to say, we wish to present the peculiar position and concern of relatively small newspapers. We feel that the removal of small-town newspapers from the mainstream of political life during elections is the most unhealthy result of enforcement of the statute in question. Their punch will be gone; they cannot expose a candidate's weaknesses without great economical and sociological detriment. This condition is something less than freedom of the press.

CONCLUSION

In spite of the unusual statement in the opinion of the Supreme Court of Florida, challenged herein, denoting the large size of THE MIAMI HERALD, the decision affects both small and large newspapers. We earnestly submit that the Court overlooked the areas touched on in this brief. These areas enlarge upon the vagueness and indefiniteness upon which lower courts have predicated their refusal to enforce this law. In its concern for possible evils of concentration of ownership,

the Court has upheld a statute which substitutes governmental for ownership control of newspapers in the area of elections. We respectfully urge the Court to declare FSA 104.38 unconstitutional and to grant the relief sought by the Appellant.

Respectfully submitted,

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FLORIDA STATUTE INVOLVED

Sec. 104.38 Newspaper assailing candidate in an election; space for reply. — If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in Sec. 775.082 or Sec. 775.083.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief of Amicus Curiae were furnished by U. S. Mail this third day of March, 1974, to Paul & Thomson, Attorneys for Appellant, 1300 First National Bank Building, Miami, Florida 33131 and Tobias Simon, Esquire, Attorney for Appellee, 1492 South Miami Avenue, Miami, Florida 33130.

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FILED
MAR 14 1974

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY, a division of KNIGHT NEWSPAPERS, INC.,

Appellant,

vs.

PAT L. TORNILLO, JR.,

Appellee.

On Appeal From the Supreme Court of Florida.

BRIEF OF THE TIMES MIRROR COMPANY, AMICUS CURIAE.

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IN THE

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Appellee.

On Appeal From the Supreme Court of Florida.

BRIEF OF THE TIMES MIRROR COMPANY, AMICUS CURIAE.

The Times Mirror Company ("Times Mirror") presents this brief as *amicus curiae,* by consent of both appellant and appellee, in support of appellant The Miami Herald Publishing Company (*"The Miami Herald"*). Times Mirror's vital interest in these proceedings stems from its publication of the *Los Angeles Times,* a privately owned metropolitan newspaper of general circulation, as well as the fact that wholly-owned subsidiaries of Times Mirror publish two metropolitan newspapers of general circulation, *Newsday* (Long Island, New York) and *The Dallas Times Herald* (Dallas, Texas) and a community newspaper, *Orange Coast Daily Pilot* (Costa Mesa, California).

Times Mirror has previously fought for the right of private newspapers to be free from governmentally forced publication and prevailed in the case of *Associates & Aldrich Company v. Times Mirror Company* (9th Cir. 1971), 440 F.2d 133.

Opinions Below.

The initial opinion of the Florida Supreme Court dated July 18, 1973 and the opinion denying rehearing dated October 10, 1973 have been reported at 287 So. 2d 78. The opinion of the Circuit Court of Dade County, reversed by the Florida Supreme Court, is reported at 38 Fla. Supp. 80 (1973). Copies of the three opinions are included in the Appendix.[1]

Jurisdiction.

The decision of the Florida Supreme Court sustained the constitutionality of Section 104.38, Florida Statutes, which *The Miami Herald* had contended to be in violation of the First and Fourteenth Amendments to the United States Constitution. The decision of the Florida Supreme Court was dated July 18, 1973; a duly presented Petition for Rehearing was denied by the Supreme Court of Florida on October 10, 1973. *The Miami Herald* filed a Notice of Appeal to this Court on November 1, 1973 pursuant to the provisions of Title 28, U.S.C. § 1257, subsection (2). [App. 45.]

This Court has postponed its final decision on the jurisdictional question. *Amicus* respectfully urges this Court to accept jurisdiction and to reverse the judgment below because:

---

[1]App. 11, 15 and 39.

(1) The decision of the Supreme Court of Florida conflicts with recent decisions of this Court (*Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 36 L.Ed.2d 772; *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 37 L.Ed.2d 699; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367);

(2) The decision of the Supreme Court of Florida conflicts with directly controlling decisions of the United States Courts of Appeals (*Associates & Aldrich Company v. Times Mirror Company* (9th Cir. 1971), 440 F.2d 133; *Chicago Joint Board, Amal. Cloth. Workers v. Chicago Tribune Co.* (7th Cir. 1970), 435 F.2d 470, *cert. den.* 402 U.S. 973);

(3) The decision of the Supreme Court of Florida conflicts with the holding of the three-judge Federal District Court in *Resident Participation of Denver, Inc. v. Love* (D. Colo. 1971), 322 F.Supp. 1100; and

(4) The decision of the Supreme Court of Florida conflicts with the thoughtful opinion of the Supreme Judicial Court of Massachusetts in *Opinion of the Justices to the Senate* (1973), ... Mass. ...., 298 N.E. 2d 829.

Question Presented.

Is a state statute imposing criminal sanctions upon the refusal of a private newspaper to publish "free of cost any reply" submitted to it by any political candidate to an article published by the newspaper which "assails [his] personal character" or charges him with "malfeasance or misfeasance in office" or "otherwise attacks his official record" violative of the free press and due process clauses of the United States Constitution?

Constitutional Provisions Involved.

The First Amendment to the United States Constitution provides, in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Section 1 of the Fourteenth Amendment states, in part:

> "* * * No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

Statutes Involved.

Section 104.38, Florida Statutes, a part of the Florida Election Code, provides:

> "§104.38 Newspaper assailing candidate in an election; space for reply.—If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083."

Sections 775.082 and 775.083, stating the criminal sanctions for commission of a misdemeanor of the first degree, are reproduced in the Appendix.[2]

Statement.

In the fall of 1972, appellee Tornillo was a candidate for the Democratic Party nomination for a seat in the Florida House of Representatives. On September 20, 1972 and September 29, 1972, *The Miami Herald* published editorials unfavorably commenting upon Tornillo's candidacy.[3]

On September 27 and 30, 1972, Tornillo requested *The Miami Herald* to print statements submitted by him in reply to the published editorials.[4]

On October 1, 1972, Tornillo filed a civil action in the Eleventh Judicial Circuit seeking to require *The Miami Herald* to publish his reply pursuant to the provisions of Section 104.38 and further seeking recovery of damages for the failure of the newspaper to publish his statement. The Circuit Court dismissed the case with prejudice, holding that Section 104.38 was (i) void as an impermissible restriction upon freedom of speech and press in violation of the First and Fourteenth Amendments to the United States Constitution and

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[2]App. 48-9. The sections provide for a punishment of imprisonment not to exceed one year or a fine not to exceed $1,000. Although the Supreme Court of Florida interpreted Section 104.38 as providing for civil as well as criminal enforcement [App. 40], civil sanctions impeding free speech are subject to the same heavy burden of justification. (*New York Times Co. v. Sullivan*, 376 U.S. 254, 265, 277.)

[3]App. 5 and 8.

[4]App. 6 and 9.

(ii) void as an unlawfully vague and ambiguous criminal statute denying *The Miami Herald* due process of law under the Fourteenth Amendment.[5]

Tornillo appealed the judgment of the Circuit Court directly to the Supreme Court of Florida. On July 18, 1973, that Court issued a decision reversing the Circuit Court and holding that Section 104.38 does not violate the United States Constitution.[6] A petition for rehearing was denied.[7]

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[5]App. 11.
[6]App. 15.
[7]App. 39.

ARGUMENT.

In the name of assuring fair elections, the State of Florida has equated its private press to a governmentally-regulated community bulletin board obliged to display the unedited statements of political candidates whose "personal character" or "official record" has been impugned.

A fair election, the nominal goal of this right of reply legislation, is, of course, a laudable objective. Infringements upon a free press are usually attempted in the name of such desired ends as national security,[8] protection of personal reputation,[9] preservation of tranquility,[10] community morality[11] and fair housing for all races.[12]

Thus the Supreme Court of Florida provides the assurance that Section 104.38 "was enacted not to punish, coerce or censor the press but rather as a part of a centuries old legislative task of *maintaining conditions conducive to free and fair elections*. . . . To assure fairness in campaigns, the assailed candidate had to be provided an equivalent opportunity to respond; otherwise not only the candidate would be hurt *but also* the people would be deprived of both sides of the controversy." [App. 19.] According to that Court, the "statute *assures*, and *does not abridge*, the right of expression which the First Amendment guarantees. The

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[8]*New York Times Co. v. United States*, 403 U.S. 713.

[9]*New York Times Co. v. Sullivan*, 376 U.S. 254.

[10]*Brandenburg v. Ohio*, 395 U.S. 444; *Cohen v. California*, 403 U.S. 15; *Edwards v. South Carolina*, 372 U.S. 229.

[11]*Winters v .New York*, 333 U.S. 507; *Kingsley Films v. Regents*, 360 U.S. 684; *Interstate Circuit v. Dallas*, 390 U.S. 676; *Stanley v. Georgia*, 394 U.S. 557.

[12]*Organization for a Better Austin v. Keefe*, 402 U.S. 415.

statute supports the freedom of the press in its true meaning—that is, the right of the reader to the whole story, rather than half of it—and without which the reader would be 'blacked out' as to the other side of the controversy." [App. 32-33.]

The reversal of traditional free speech protections is covered with a scholarly patina supplied by Jerome A. Barron, one of counsel for appellee Tornillo. He has explained in the Harvard Law Review that preservation of a "true marketplace of ideas" compels abandoning the "romantic view" of the First Amendment and imposing governmental intervention upon editorial judgment in order to assure free access of the public to the means of mass communication.[13]

Although Florida has chosen to adopt this destruction of free speech in order to save it, no such drastic alteration of federal constitutional rights may be sanctioned.

1. The Burden of Justification Imposed Upon Regulation of Speech Is Heavy.

This Court throughout the 20th century has undertaken a primary responsibility of insuring that government does not interfere with publication by the press absent a compelling showing of dire public necessity.[14] Whether or not couched in terms of a "clear and present danger,"[15] the burden of justification imposed

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[13]Barron, *Access to the Press—A New First Amendment Right*, 80 Harv.L.Rev. 1641 (1967).

[14]*Schenck v. United States*, 249 U.S. 47; *Papish v. University of Missouri*, 409 U.S. 667.

[15]*Brandenburg v. Ohio*, 395 U.S. 444, 451-7 (Douglas, J.); Frantz, *The First Amendment in the Balance*, 71 Yale L.J. 1424 (1962); Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 Colum.L.Rev. 313, 330 (1952).

upon regulation of speech is heavy. (*New York Times Co. v. United States*, 403 U.S. 713, 714.) If this is, as Barron asserts, a "romantic" view of the First Amendment, it is nonetheless one thoroughly ingrained in the law of the land.

2. Compelled Speech Is as Invidious as Censored Speech.

Governmental action *compelling* speech is equally invidious to the state's activities in *restricting* speech. Although the usual attack upon freedom of speech and press is in the form of prohibiting publication, "[t]here is no difference between compelling publication of material that the newspaper wishes not to print and prohibiting a newspaper from printing news or other material." (*Associates & Aldrich Company v. Times Mirror Company* (9th Cir. 1971), 440 F.2d 133, 135; *Chicago Joint Board, Amal. Cloth. Workers v. Chicago Tribune Co.* (7th Cir. 1970), 435 F.2d 470, 478, *cert. den.* 402 U.S. 973; see *Avins v. State University of New Jersey* (3d Cir. 1967), 385 F.2d 151, 152-154, *cert. den.* 390 U.S. 520; Chafee, *Government and Mass Communications*, 633 (1947).) The proposition is surely self-evident. A virtually universal feature of totalitarian regimes is the Ministry of Information which directs the publication of news in a form favored by the state.[16]

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[16]A chilling example is the era of Nazi Germany. Daily press directives presented in exquisite detail governmental requirements for the presentation of news, down to specifying the obligatory press reaction to the Duke of Windsor's wedding. (Grunberger, *The 12-Year Reich, A Social History of Nazi Germany 1933-1945*, 395 *et seq.* (1971).) The inevitable deterioration of the quality of the press under such circumstances is illustrated by the author's notation that "[q]uite a few practising journalists, actual-

(This footnote is continued on next page)

3. The Florida Statute Inevitably Will Require Intervention in Editorial Decisions.

Government intervention is an indispensable adjunct of the administration of Section 104.38. In thrusting aside *The Miami Herald's* claim of unconstitutional vagueness, the Supreme Court of Florida construed the statutory right to require the publication of "any reply" as referring only to a reply which is "wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane." [App. 30.]

One may imagine the extent of involvement of the Florida courts in making advance determinations of the extent to which the proposed reply is responsive, libelous, slanderous, vulgar or profane. Indeed, Professor

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ly, far from resenting the fact that their columns had become official notice-boards, welcomed Goebbels's scheme because it freed them from the burden of responsibility." (*Id.* at 395.)

Such intrusions upon freedom are customarily promulgated in the name of freedom itself. For example, the military junta in Peru enacted a "freedom of the press law" which included a requirement that each newspaper print in their entirety, on the first page, all official government communications. (*Los Angeles Times*, January 25, 1970, § A, at 16, cols. 1-2.)

A survey of the International Press Institute reported that "[c]ompelling newspapers to publish official handouts or any other material inspired by the government is certainly one of the worst abuses of power. It is current practice in totalitarian countries. In Spain, for example, papers are bound to publish material issued by the government, but have to pretend that it is put out by the newspaper office itself." Further examples are cited from Yugoslavia, Lebanon, Ecuador, Argentina and Colombia. (*Government Pressures on the Press*, IPI Survey No. 4, Zurich, 99-101 (1955).) A further IPI publication detailed the activities of totalitarian governments in the Soviet Union, East Germany and Spain in issuing press "directives" requiring the publication of government inspired news. (*The Press in Authoritarian Countries*, IPI Survey No. 5, Zurich, 23-25, 87-89, 143-145 (1959).)

Barron himself recognizes the indispensable role of the judiciary in actively regulating any governmentally-compelled right of access. He concedes that *someone* must have the right to edit the contents of a newspaper since "the daily press cannot be placed at the mercy of the collective vanity of the public."[17]

It is no aid to the constitutionality of Section 104.38 to note that Florida judges rather than a Florida administrative agency will be administering the governmental supervision of Florida's press. Courts are agencies of government whose actions are measured by the same constitutional standards as are applicable to the other branches. (*Shelley v. Kraemer*, 334 U.S. 1; *New York Times Co. v. Sullivan*, 376 U.S. 254; *Bursey v. United States* (9th Cir. 1972), 466 F.2d 1059, 1082-1083.) Accordingly, judicial restraints upon speech also carry the heavy burden of justification. (*New York Times Co. v. United States*, 403 U.S. 713, 714; *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419.)

4. The Private Press Is Not Subject to the "Fairness Doctrine" Imposed Upon the Broadcast Media.

We read two recent decisions by this Court as reaffirming a commitment to protect the press from government intrusion upon the selection of material for publication.

Although broadcast media are by technical necessity subject to the degree of governmental regulation implicit in the award of licenses to utilize scarce frequencies (*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-8, 400-01), such regulation does not

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[17]Barron, *Access to the Press—A New First Amendment Right*, 80 Harv.L.Rev. 1641, at 1677 (1967).

include compelling radio or television stations to accept and broadcast editorial advertisements. (*Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 36 L.Ed.2d 772.) Mr. Chief Justice Burger's opinion, in part II concurred in by Mr. Justice Stewart and Mr. Justice Rehnquist, pointed out that "[t]he power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: First, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and second, the journalistic integrity of its editors and publishers." (36 L.Ed.2d at 792.) In part IV, for the Court, it was held that the Court of Appeals' imposition of a constitutional right of access to broadcast media was erroneous and constituted an unreasonable risk of governmental interference with the content of broadcast discussion of public issues. It was so held although "the use of a public source by the broadcast media permits a limited degree of Government surveillance, *as is not true with respect to private media*. . . ." (Emphasis added, 36 L.Ed.2d at 797.) Mr. Justice Douglas and Mr. Justice Stewart equated broadcast media to the private press insofar as the regulation of editorial content is concerned and rejected the constitutionality of government dictation of material to be broadcast or published. Even dissenters Mr. Justice Brennan and Mr. Justice Marshall, in footnote 12 to the opinion written by Mr. Justice Brennan, suggested that governmentally compelled publication of editorial ads in newspapers "would be impossible" and "would violate the First Amendment" because the "decision as to who shall operate newspapers is made in the free market, not by Government fiat." (36 L.Ed.2d at 829.) These

views render inappropriate the reliance of the Florida Court upon *Red Lion* and "fairness doctrine" applied by the FCC to broadcasters. [App. 24-26.]

In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations,* 413 U.S. 376, 37 L.Ed.2d 669, Mr. Chief Justice Burger and Justices Douglas, Stewart and Blackmun dissented from a majority holding that it was constitutionally permissible for the City of Pittsburgh by ordinance to prevent the private press from listing help wanted advertisements under sexually segregated headings. The tenor of these dissents was that the Pittsburgh ordinance constituted an unconstitutional interference with the contents of a newspaper. The opinion of the majority relied upon the commercial character of the speech regulated and the underlying illegality of the sexual discrimination alleged to be fostered by the segregated ads. In its conclusion, the majority emphasized that nothing in the holding would be deemed to "authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial." (37 L.Ed.2d at 680.)

We recognize that it is chancy at best to attempt such a synthesis of cases involving the presentation of individual opinions, but *Columbia Broadcasting System* and *Pittsburgh Press* indicate to us a continued commitment to the untrammeled right of the private press, large and small, to determine the content of newspapers. The Supreme Judicial Court of Massachusetts recently shared this interpretation of *Columbia Broadcasting System* and *Pittsburgh Press* in advising that proposed

Massachusetts legislation requiring the publication of "reply" political advertising would violate the United States Constitition. (*Opinion of the Justices to the Senate* (1973), ... Mass. ....., 298 N.E.2d 829.)

5. The Florida Statute Will Inevitably Result in Self-Censorship.

The detrimental impact of Section 104.38 upon freedom of the press will be not only the direct intervention of government in editorial decisions, but also the chill of self-censorship. Publications considering a controversial article respecting a political candidate will perforce weigh the desire to publish against the risk of being forced to speak, verbatim, the words of others. The impetus to silence from such an eventuality is itself unconstitutional interference with freedom of speech and press. (*New York Times Co. v. Sullivan*, 376 U.S. 254, 279; *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 461-3.)

6. The Size of the Miami Herald Is Irrelevant to Its Constitutional Rights.

The offhand reference of the Supreme Court of Florida to the fact that *The Miami Herald* is "the largest newspaper published in Florida" [App. 22-23] is irrelevant to its rights of free speech and press. No rational theory supports the proposition that large newspapers are less free than others. No case supports the proposition that a special category of the press exists which is subject to editorial dictation by government. The Ninth and Seventh Circuits have expressly rejected the argument. (*Associates & Aldrich Company v. Times Mirror Company* (9th Cir. 1971), 440 F.2d 133, 134-6; *Chicago Joint Board, Amal. Cloth.*

Workers v. Chicago Tribune Company (7th Cir. 1970), 435 F.2d 470, 474 and 478, *cert. den.* 402 U.S. 973; and see *Resident Participation of Denver, Inc. v. Love* (D. Colo. 1971), 322 F.Supp. 1100.) This Court has vigorously protected the freedom of the largest newspaper in the United States without regard to its dominance in, at the least, the area of its publication. (*New York Times Co. v. Sullivan,* 376 U.S. 254; *New York Times Co. v. United States,* 403 U.S. 713.)[18]

7. The Record Does Not Demonstrate Any Justification Sufficient to Sustain the Restraint Imposed by Section 104.38 Upon Free Speech and Press.

In the light of the foregoing principles, Section 104.38 cannot stand. There is nothing in the record to support the untenable proposition that elections in Florida are in imminent danger of collapse absent compelled publication of candidates' statements in newspapers. No effort has been made to show a "serious and imminent" threat to the electoral machinery (*Craig v. Harney,* 331 U.S. 367, 373) or that no less drastic means exist to deal with that threat short of interfering with the editorial judgments of the private press (*Sherbert v. Verner,* 374 U.S. 398, 407). No such demonstration is possible. (See *Mills v. Alabama,* 384 U.S. 214.)

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[18]Newspapers, in their business aspects, are concededly subject to economic regulation, including that pertaining to the formation of monopolies. (*Citizen Publishing Company v. United States,* 394 U.S. 131; *Lorain Journal Co. v. United States,* 342 U.S. 143; *Associated Press v. United States,* 326 U.S. 1.) Those decisions hardly support governmental regulation of editorial content; rather, each emphasizes the entirely separate nature of economic, business regulation which does not trench upon editorial freedom. (*Cf. Grosjean v. American Press Co.,* 297 U.S. 233.)

The only justification seriously attempted to be advanced in support of the statute is the convoluted view of the First Amendment which supposes that government regulation of speech is the road to freedom.

8. The Florida Legislation Is Not a Mere Correction or Retraction Statute.

So-called "correction" or "retraction" statutes enacted in some of the states are inapposite to Section 104.38. Such statutes assume a false and libelous publication, actionable even in the light of the constitutional inhibitions upon defamation actions. The publisher is afforded the opportunity to correct in order to mitigate or eliminate damages he otherwise would be required to pay. (I Hanson, *Libel and Related Torts,* 149-161 (1969).) Far from constituting an infringement upon private editorial discretion, these statutes are legislative limitations upon the civil right of action for defamation and implement the concepts articulated in *New York Times Co. v. Sullivan,* 376 U.S. 254.

Conclusion.

The Florida Supreme Court reveals a disturbing sense of impatience and pique with the press. That Court, in surrendering news columns to political candidates desiring to issue government compelled and supervised replies, comments that the First Amendment is "not merely for a select few" and "did not create a privileged class" able to deny to the people freedom of expression. [App. 23.] The Court wished it to "be remembered that First Amendment Freedom of the Press is for the benefit of *all* the people and not just those who have invested money in the publishing business." [App. 43.]

It may be that vesting untrammeled discretion in private editors and publishers to choose the words they would publish has not always produced the most profound or even the fairest speech. However, our commitment to this freedom has served us well for nearly 200 years. We know of no state utilizing government controls upon the press which can point to a more unfettered intercommunication of ideas or, for that matter, fairer elections.

All temptations to create a judicial or administrative "referee" to insure that the press properly approaches its task run head on into the reality that such a proposition is an "iridescent dream" predicated upon the naive assumption that it is the "splendid fellows in our crowd [who] will be exercising the large powers over the flow of facts and opinions which seem to us essential to save society. . . ."[19]

If Florida's reach for utopia is undeterred by the sole body left with that opportunity, one may be sure that politicians across this country will hasten to employ the pages of private newspapers for their own purposes.

The nation will be the loser.

For the foregoing reasons, this Court should reverse the judgment of the Supreme Court of Florida.

Respectfully submitted,

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GIBSON, DUNN & CRUTCHER,
Of Counsel.

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[19]Chafee, *Government and Mass Communications,* 709 (1947).

Supreme Court, U. S.
FILED
MAR 25 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of
KNIGHT NEWSPAPERS, INC.,
Appellant,

v.

PAT L. TORNILLO, JR.,
Appellee.

On Appeal From The Supreme Court of Florida

BRIEF OF AMICUS CURIAE

DONALD U. SESSIONS

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March 23, 1974

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INTEREST OF AMICUS CURIAE

Donald U. Sessions, who files this Brief as amicus curiae with the consent of all parties, is a citizen and resident of the State of Florida; he is a member of the Florida Bar and a member of the Bar of this Court.

His interest in this case is his desire to have a government of the people by the people, without a manipulation of our electoral system and government by the monopolistic combinations who own and/or control the instruments of the newspaper industry. He filed a Brief amicus curiae with the Florida Supreme Court, and a copy thereof was forwarded to this Court by Appellant as a part of the Record of this case.

ARGUMENT

Our system of government is founded upon an electoral system by which the people elect their government officials. We have staked upon it our all. Right conclusions are more likely to be arrived at with an informed electorate than with an electorate whose information has been arbitrarily restricted by the few who own a monopoly of the instruments of the newspaper industry.

The restriction of the dissemination of news and information, by the few who control the instruments of the newspaper industry, can subvert our system of government just as surely as any monopoly can operate to the detriment of the people.

If the small group which controls and monopolizes the instruments of the

newspaper industry are permitted to restrain and abridge the people's knowledge and freedom of expression, then that small group will be able to manipulate elections, and thereby will be able to select only those legislators and governmental executives whose actions will accord with the wishes of the small group. By restricting the information to be released to the electorate, that small group will have constituted itself as a privileged class able and willing to manipulate the people, the election, and the government.

A most significant book, AMERICA, INC., WHO OWNS AND OPERATES THE UNITED STATES (1971) by Morton Mintz and Jerry S. Cohen, The Dial Press, in Chapter 2, details political pressures brought by newspaper-combination monopolies for their own financial benefit,

and lists components and activities of newspaper empires.

The First Amendment freedoms (worship, speech, press, assembly, and petition) amount to the freedom of expression. Freedom of the press is but a part of the freedom of expression. These freedoms were retained by the people for all of the people, and not merely for a select few. The First Amendment did not create a privileged class which, through a monopoly of the instruments of the newspaper industry, would be able to deny to the people the freedom of expression which the First Amendment guarantees.

The First Amendment freedoms of expression constitute a part of a National Trust which must not be surrendered to a private monopoly.

Elections of governmental officials by the people, to result in a selection that is fair and just for all or even for a majority, must be by an informed electorate. This can be possible only when there has been a dissemination of truth, information, and news from various sources.

This Court has held, in Brown v. Piper (1875), 91 U.S. 37, at 42, that "Courts will take notice of whatever is generally known within the limits of their jurisdiction; and if the judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he may deem safe and proper."

It is generally known that Knight Newspaper, Inc., an Ohio corporation, is a cross-state and interstate newspaper empire, owning and operating

newspapers in at least seven States. Such information is readily available to the public in Standard & Poor's Corporation Reports in stock-brokers' offices across the nation. These Reports show that Knight Newspapers, Inc., is the third largest combination of newspapers in the nation (based on circulation), and owns and operates the following newspapers:

The Miami Herald
Tallahassee Democrat
Bradenton Herald
Boca Raton News
Orlando Citizen News
Coral Gables Times
The Guide
Florida Keys Keynoter
North Dade Journal
Union-Recorder
Macon News
Macon Telegraph
Columbus Inquirer
Columbus Ledger
Lexington Herald
Lexington Leader
Charlotte Observer
Charlotte News
Philadelphia Inquirer
Philadelphia Daily News
Akron Beacon Journal
Detroit Free Press

Mr. Justice Learned Hand, in United States v. Associated Press (1943), 52 F.Supp. 362, 372, stated that the newspaper industry "serves one of the most vital of all general interests; the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all. * * * 'If one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue. * * * The

phrase * * * can, in the nature of things, mean no more than that an industry, for adequate reasons, is subject to control for the public good.' Nebbia v. New York, * 291 U.S.534, 536."

This Court in Associated Press v. United States (1945), 326 U.S. 1, stated "Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First

Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity."

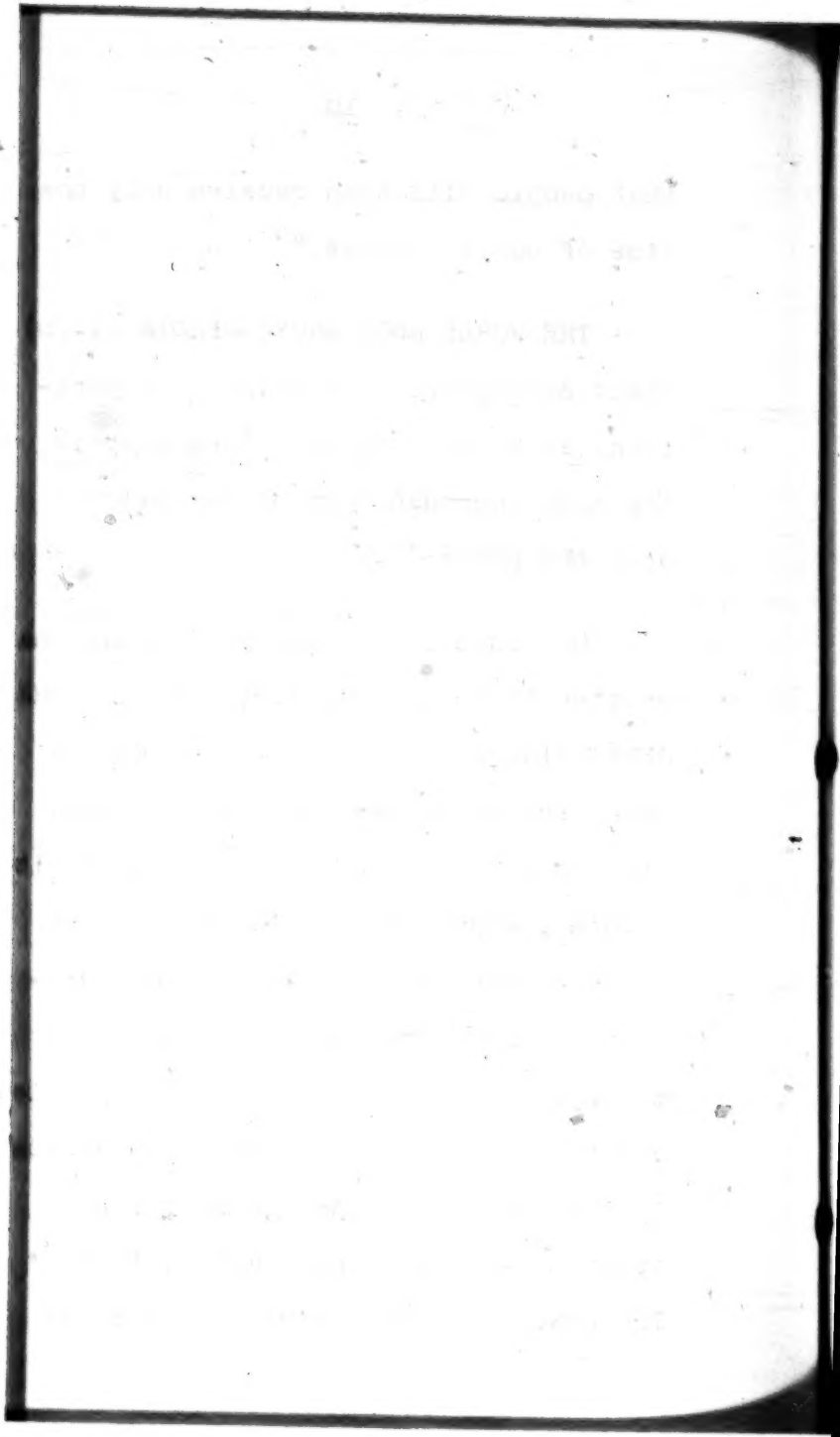
When Appellant, The Miami Herald Publishing Company, a division of Knight Newspapers, Inc., established itself in monopolistic control of the newspaper industry in Miami, Florida, and refused to print the material of the Appellee, it abridged the freedom of the press both of the Appellee and the people.

MERIT STUDENTS ENCYCLOPEDIA, Vol. 7 (1972), Crowell-Collier Educational Corporation, states: "A number of persons believe that the greatest challenge to America's free press lies not in interference from the government but in the trend toward fewer and fewer newspapers. They fear that many mergers in the newspaper field will create a monopoly and

that people will then receive only one side of public issues."

THE WORLD BOOK ENCYCLOPEDIA (1970), Field Enterprises Educational Corporation, at F-433, states: "Monopoly is the most thorough form of restraint upon the press."

Mr. Justice William O. Douglas has written in an article contained in THE GREAT RIGHTS (1963), edited by Edmond Cahn, The MacMillan Company: "Where one paper has a monopoly in an area, it seldom presents two sides of an issue. It too often hammers away on one ideological or political line using its monopoly position not to educate people, not to promote debate, but to inculcate in its readers one philosophy, one attitude -- and to make money. * * * The newspapers that give a variety of



views and news that is not slanted or contrived are few indeed. And the problem promises to get worse rather better. . ."

Dr. Ben H. Bagdikian, in THE INFORMATION MACHINES, THEIR IMPACT ON MEN AND THE MEDIA (1971), wrote: "Local monopoly in printed news raises serious questions of diversity of information and opinion. What a local newspaper does not print about local affairs does not see general print at all. And, having the power to take initiative in reporting and enunciation of opinions, it has extraordinary power to set the atmosphere and determine the terms of local consideration of public issues."

And, in the Introduction to the same work, Dr. Bagdikian wrote: "The men who control these instruments of communication have enormous power. Where once

priests and kings decided what the populace would hear, the proprietors of the mass media now decide. As men gather in ever-larger interdependent masses, communications technology becomes more important and increases the power of those who control it. . "

Stanford Smith, of American Newspapers Publishers Association, before the U. S. Senate Constitutional Rights Subcommittee in 1971, stated: "Freedom of the press is embodied in our Constitution for the benefit of all the people and not as an exclusive prerogative of those who are engaged in the business of news dissemination. . ."

THE HALIFAX REPORTER (Oct.27,1971) of Ormond Beach, Florida, printed an article by Tom Little, of Daytona Beach, Florida, as follows:,

The alarming growth in what appears to be ever increasing abuses of the "freedom of the press privilege", by far too many newspapers, calls for a searching investigation by appropriate agencies to determine if the constitutional rights of our citizens at large are being aborted.

Too many editors and publishers seem to have acquired the idea that the First Amendment has endowed them with a "Divine Right of Kings" to distort and suppress the news at will, and to criticize, censor and condemn our citizens at their pleasure.

How often have we seen some of our newspapers single out a citizen for adverse publicity, then proceed to act as a self-appointed judge, jury and executioner against the accused, even at times denying the accused the right of rebuttal and defense in their papers ?

Our Constitution is an "equitable document". The First Amendment's "right of free expression" is a grant to all citizens. It is not an exclusive gift to editors and publishers, as so many appear to believe.

These editors and publishers, so quick to come to the rescue of each other on First Amendment issues, are always among the first to deny the same right of expression in rebuttal and defense to the very ones they have accused and condemned.

Formerly competition among daily newspapers was the great public protector. Today through consolidation, syndication, the acquisition of radio

and TV Stations and the demise of vast numbers of newspapers, competition rapidly is vanishing and news corporations are acquiring monopolistic influence over huge areas of the country.

All the more reason why a national reappraisal is now imperative.

In Times-Picayune Publishing Co. v. United States (1953), 345 U.S. 594, Mr. Justice Clark pointed out that a newspaper generally receives more than two-thirds of its total revenue from its advertisers, and only the remainder from its readers; that the number of daily newspapers in the United States was then at the lowest point since the century's turn, that daily newspaper competition within individual cities had grown nearly extinct, and that certain monopolistic newspaper business practices had extinguished newspaper competition in many instances.

Morris L. Ernest, a member of the New York Bar since 1912 and for decades counsel for the American Newspaper Guild

and the Authors League of America, in THE FIRST FREEDOM (1946), The MacMillan Company, traces freedom of speech and freedom of the press, and shows the abridgement thereof by those who through monopolies control the newspaper field (and radio and movies). He writes:

"To me the important issue is solely the need of competition in these most significant industries -- which manufacture, distribute and retail food for the mind. In the final chapter I point to many means of reversing the monopoly trend and upsetting the present cartelization of press, radio and movies.

"Having spent much of my life fighting for freedom of thought -- freedom from governmental controls -- I have concluded that we have done a magnificent job in removing government from its historic role of nursemaid to the

mind of man. However, I have recently concluded that far more is kept from our minds by lack of diversity of ownership of the means of communication than by government interference.

"I am convinced that it is not too late to stem the tide. But we must act fast and with bravery. Courts alone cannot do the job. Our Congress must produce a national debate on what to do about our vanishing freedom -- the evaporation of diversity of opinion. If we do not step in soon the totalitarian trend of the world will capitalize on our trend toward monopoly. Then freedom, as we have known it, will vanish from our nation."

The Commission On Freedom Of The Press, in A FREE AND RESPONSIBLE PRESS (1947), The University of Chicago Press, held that "Freedom of the press is

essential to political liberty. Where men cannot freely convey their thoughts to one another, no freedom is secure."

The said Commission considered

Newspaper Concentration
Chains
Local News Monopolies
The Communications Empires
News Agencies,Features And Syndicates
Monopolistic Practices
The Cost of New Ventures
The Bias Of Owners

and held that: "The First Amendment was intended to guarantee free expression, not to create a privileged industry. ."

"The greatest difficulty in preserving free communications in a technical society arises from the concentration of power within the instruments of communication. The most conspicuous example of this is in the ownership of instrumentalities. . . The danger is that the entire function of communications will fall under the control of fewer and fewer persons. . . "

In FREEDOM OF THE PRESS (1947) by William E. Hocking, The University of Chicago Press, Archibald MacLeish, one of the members of The Commission On Freedom Of The Press, had this to say:

"Freedom of the press is a right belonging, like all rights in a democracy, to all the people. As a practical matter, however, it can be exercised only by those who have effective access to the press. Where financial, economic, and technological conditions limit such access to a small minority, the exercise of that right by that minority takes on fiduciary or quasi-fiduciary characteristics. The exclusive exercise of a general right by a limited minority can be justified only if the exercise is of such a character as to realize the general purpose for which the right was established. One of the purposes of the

guaranty of freedom of the press was to assure the publication of the widest possible variety of opinion."

Section 104.38, Florida Statutes, in the interest of all the people, provides that candidates for public office shall have a right of expression when their personal character has been assailed. It does not deny to any candidate a right of expression, and it does not deny to the owner of the instruments of the newspaper industry any right of expression. That statute assures, and does not abridge, the right of expression which the First Amendment guarantees.

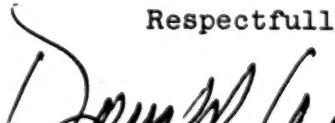
The said Statute is known throughout Florida as the RIGHT TO REPLY LAW. Until now, Appellant and other newspapers have so labeled the law.

CONCLUSION

This Court should determine that Section 104.38, Florida Statutes, was enacted in the general interest as a step toward maintaining for the people a freedom of expression and a system of government by the people, that that statute is not in violation of the Florida Constitution or the United States Constitution, and that that statute required a publication by the Appellant of a reply by the Appellee.

The Judgment and decision of the Supreme Court of Florida should be affirmed.

Respectfully submitted,



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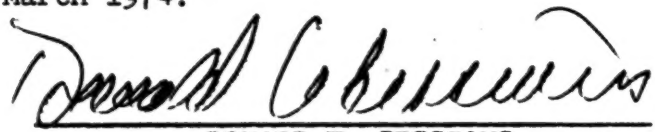
CERTIFICATE OF SERVICE

Donald U. Sessions, as a member of the Bar of the Supreme Court of the United States, hereby certifies that three copies of the foregoing Brief were mailed by U. S. Mail to PAUL & THOMSON, Attorneys for Appellant, 1300 First National Bank Building, Miami, Florida 33131, and that three copies of the foregoing Brief were mailed by U.S.Mail to TOBIAS SIMON and ELIZABETH DuFRESNE, Attorneys for Appellee, 1492 South Miami Avenue, Miami Florida 33130, by depositing the same in the United States Post Office at Daytona Beach, Florida, with first class postage prepaid, addressed as herein stated, this 23rd day of March 1974.



DONALD U. SESSIONS

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MICHAEL RODAK,

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of
KNIGHT NEWSPAPERS, INC.,
Appellant,

v.

PAT L. TORNILLO, JR.,
Appellee.

On Appeal from the Supreme Court of Florida

BRIEF FOR APPELLEE PAT L. TORNILLO, JR.

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MIAMI REVIEW — 371-4853 — 377-3721

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In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of
KNIGHT NEWSPAPERS, INC.,

Appellant,

v.

PAT L. TORNILLO, JR.,

Appellee.

On Appeal from the Supreme Court of Florida

BRIEF FOR APPELLEE
PAT L. TORNILLO, JR.

QUESTION PRESENTED

Does not Section 104.38, Florida Statutes, implement freedom of speech, press and due process of law guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, by compelling a newspaper to provide free space to a candidate in a state election to reply to an editorial in the newspaper which "assails (his) personal character", or charges him with "malfeasance or misfeasance" in office, or "otherwise attacks his official record"?

ARGUMENT

Introduction and Summary

The fundamental issue in this case is whether the Florida right of reply statute (F.S. §104.38) is consistent with the First Amendment. The simplicity of the issue before this Court must be emphasized since considerable effort has been expended by appellant, and allied *amici*, to intrude the distraction into this proceeding of various issues which are in no sense present. An example of such straw man distractions is the dogged effort by appellant to confuse the issues in this case with the issue of whether the First Amendment, of its own force, imposes any duty to provide access to the public by private newspapers. Still another issue much talked about in the briefs, but not even remotely related to the issues in this proceeding, is whether broadcasting's fairness doctrine should be applied to the press.

Appellee supports its view that §104.38 is constitutional on the following grounds. First, appellee contends that the Florida right of reply statute is not a restraint on freedom of expression, but in fact encourages and implements freedom of expression. The key point about the statute in this regard, as was stressed by the decision below, is that no newspaper "content is excluded", but, rather, the statute is "designed to add to the flow of information and ideas." App. p. 22.

Second, the statute is validated by its complete consistency with the major premise of *New York Times v. Sullivan*, 376 U.S. 254 (1964): The First Amendment should be interpreted to encourage "open and robust debate on public issues". The statute is clearly validated by this Court's counsel to the states in *Rosenbloom v. Metromedia*, 403 U.S. 29 at 47, footnote 15 (1971), that if the states are concerned that citizens do not have appropriate legal resources "to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern."

Third, the Florida right of reply statute is constitutionally authorized as a permissible regulation of freedom of the press, because of the overriding police power interest in assuring fair and honest elections. Indeed, compared with other state legislation affecting the press, this statute presents much less in the way of constitutional obstacles, since this statute in no sense restricts content. See, e.g., Appendix to this Brief.

Fourth, the Florida right of reply statute, F.S. §104.38, is neither impermissibly vague nor unnecessarily

broad. This proceeding is a non-criminal proceeding. The statute has received a narrowing construction from the state Supreme Court. Finally, any chilling effect will result from the refusal to validate the statute, rather than the contrary.

Fifth, F.S. §104.38 is not fairly subject to charges of accomplishing an invalid taking of appellant's property. The incidental use of private property by §104.38 for the exercise of First Amendment rights does not deprive appellant of property without due process of law. The exercise of First Amendment rights on either public or private property has never called for payment in the prior decisions of this Court. Furthermore, any taking that has been accomplished by the facts of this case has been accomplished by appellant's destruction of appellee's reputation, and by its frustration of appellee's rights to exercise precious First Amendment and political rights.

Sixth, although finality problems in a technical sense have been created by appellant's refusal to concede that it will publish appellee's replies if this Court upholds F.S. §104.38, the chilling effect on Tornillo and other candidates for office that will result from failure to resolve the issue, justifies resolution by this Court of the constitutionality *vel non* of F.S. §104.38.

For the foregoing reasons, Appellee contends that this Court should uphold §104.38 as entirely consistent with the First Amendment.

I.

THE FLORIDA RIGHT OF REPLY STATUTE IS NOT A RESTRAINT ON THE FIRST AMENDMENT BUT ENCOURAGES AND IMPLEMENTS FREEDOM OF EXPRESSION.

A fundamental aspect of this case which the Supreme Court of Florida quite properly underscored is that the statute in question here has not prevented the *Miami Herald* from saying anything it wished. No administrative agency, no court, has prevented the appellant from expressing itself. The Florida right of reply statute is not ideologically partisan. There is no single idea the expression of which is proscribed by the Florida statute. On the contrary, the expression of ideas is encouraged and furthered by this legislation. *The dispositive constitutional implications for validity of a statute which demands debate in certain limited circumstances and a statute which inhibits or circumscribes expression can not be over-emphasized.* Indeed, the Supreme Court of Florida in the decision below emphasized this precise point:

> "The statute here under consideration is designed to add to the flow of information and ideas and does not constitute an incursion upon First Amendment rights or a prior restraint, since no specified newspaper *content is excluded.* There is nothing prohibited but rather it requires, in the interest of full and fair discussion, additional information." App. p. 22.

There is nothing novel in the concern expressed by the decision below for "full and fair discussion." Similarly,

affirmative legislation designed to assure the free flow of information to the electorate is hardly a concept which is foreign to our First Amendment case law.

Censorship is the epithet applied by appellant, and its allied *amici*, to the Florida right of reply statute. To label as censorship Tornillo's effort to enforce Florida's right of reply statute, F.S. §104.38, is a triumph for the Orwellian use of language. The paradox of this case is that the only censorship that has occurred in the case before this Court is attributable to the appellant. Appellant editorially attacked Tornillo. Tornillo sought the reply provided by state law and appellant then refused to allow him to voice that reply. And yet the astonishing theme running through the briefs of the appellant, and the host of *amici* from the media industry who have joined them, is that Tornillo's censors should themselves be regarded as the defenders of freedom of expression.

There is a special irony in appellant's insistence that existing imbalances and inequalities in the communications process can be cured by enforcement of the antitrust laws rather than legislation such as §104.38 which specifically provides for a limited right of reply. Appellant has itself received special immunity from the antitrust laws enacted pursuant to the Newspaper Preservation Act, 15 U.S.C. §1801, by Congress in 1970.

The *Miami Herald*, the appellant in this case, along with newspapers in 22 cities, is one of the beneficiaries to this special immunity. Appellant's argument is worthy of characterization by author Joseph Heller, who in his novel *Catch 22* so memorably portrayed the impenetrable labyrinths spun by modern military and bureaucratic

techniques. Thus, appellant tells us soothingly that right of reply legislation is unnecessary to deal with problems of concentration of ownership in the media since that is the task of the antitrust laws. The only difficulty with this proffered solace is that appellant discreetly fails to mention that it has secured immunity from the antitrust laws.

Appellant takes umbrage at the concern expressed by the decision below about the effects of concentration of ownership in the media on the free flow of information in this country. On this point, the decision below states:

> "The right of the public to know all sides of a controversy and from such information to be able to make an enlightened choice is being jeopardized by the growing concentration of the ownership of the mass media into fewer and fewer hands, resulting ultimately in a form of private censorship." App. p. 22.

Appellant's response to this concern is to say that the "antitrust laws are adequate to deal with such problem, if they are found to exist in fact." Appellant's Brief, p. 27. In the light of the Newspaper Preservation Act, this response is less than persuasive.

Paradoxically, the grant of an exception by the Newspaper Preservation Act to the affected newspapers from antitrust law enforcement was justified on the ground that insofar as possible the existence of two daily newspapers in a community should be encouraged. If the only way that goal can be secured is by legislation specifically condoning behavior which would otherwise violate the antitrust laws, then according to this reasoning, such legisla-

tion is justified. This was the rationale behind permitting newspapers in 22 cities, including the City of Miami and the *Miami Herald*, to enter into joint operating agreements and to set joint advertising subscription rates which would otherwise violate the antitrust laws.

The Newspaper Preservation Act permits joint operating agreements between "competing" dailies in the same city in order to give the newspaper readership in those cities the continuing benefit which is believed to result from having access to *two* editorial pages and *two* daily newspapers in the same community.

If legislation like the Newspaper Preservation Act, designed to assure diversity of opinion is constitutionally permissible, it is difficult to perceive why legislation like the Florida right of reply statute, §104.38, is also not constitutionally permissible. See Barron, FREEDOM OF THE PRESS FOR WHOM? pp. 18-19 (Indiana University Press, 1973).

The governmental largesse received by the *Miami Herald* under the Newspaper Preservation Act was pointed out in the Appellee's Response to Appellant's Jurisdictional Statement in order to show the inconsistency of appellant's position, which alternately favors and disfavors legislation designed to secure diversity of opinion. (See Appellee's Response, p. 18.) Appellant has not provided any explanation for its inconsistent position in its brief on the merits.

"In it (the Newspaper Preservation Act) Congress specifically exempted joint operating agreements among newspapers from the anti-trust laws. The Act made it possible for two news-

> papers in a community to share facilities and to establish joint advertising rates. This made it even harder financially for any new entrant to enter a new community where such an agreement was in force. *Should this kind of extraordinary governmental aid impose new responsibilities? If government can legislate to benefit the press, can it not also legislate to benefit the readership?"* See Barron, FREEDOM OF THE PRESS FOR WHOM? p. 18 (Indiana University Press, 1973). (emphasis added.)

There can be no doubt that legislation designed to protect freedom of expression is constitutional. The fairness doctrine in broadcasting, the application of the antitrust laws to the press, to give but two famous examples, were both constitutionally upheld on this basis. *Associated Press v. United States*, 326 U.S. 1 (1945); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). The legislation in question in each case was upheld on the ground that the regulation in each instance implemented First Amendment objectives. In order to refute the extravagant arguments made by appellant and its media allies for immunity of the press from all legal, indeed all social obligation, it is hard to improve upon the words of Mr. Justice Black, speaking for this Court, in *Associated Press v. United States, supra* at 20.

> "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."

Appellant puts particular stress on an excerpt from Mr. Justice Douglas' concurring opinion in *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*,

36 L.Ed.2d 772, 811 (1973) quoting Professor Emerson to the following effect:

> Thomas I. Emerson, our leading First Amendment scholar has stated that " * * * any effort to solve the broader problems of a monopoly press by forcing newspapers to cover all 'newsworthy' events and print all viewpoints, under the watchful eyes of petty public officials, is likely to undermine such independence as the press now shows without achieving any real diversity." *The System of Freedom of Expression* (1970), p. 671.

This passage is quoted by appellant as dispositive of the contention that concentration of the media can be cured by government regulation of the content of the press. Reliance on this passage creates a misconception that Professor Emerson has expressed himself against right of reply legislation; the contrary is the case.

Professor Emerson in the passage quoted above is speaking against any attempt to create "an administrative tribunal" to enforce a "fairness doctrine" for the press. See Emerson, *The System of Freedom of Expression* (1970), p. 670. But Professor Emerson makes it expressly clear in the very sentence preceding the passage quoted above that "[*a*] *limited right of access to the press can be safely enforced.*" Emerson, *supra* at p. 671. Moreover, Professor Emerson with his customary precision is very careful to show that he includes within a "limited right of access" a right of "reply to libel and to personal attack." Emerson, *supra*, at p. 671. It should be noted that, contrary

to appellant's effort to limit right of reply exclusively to a libel context, Professor Emerson concludes that legislation enforcing a right of reply "through the usual forms of the judicial process" could constitutionally reach right of reply to "libel" and, as in this case, to "personal attack."

Not only has Professor Emerson expressed sympathy for a right of reply to the press, he has expressly stated that right of reply legislation is consistent with freedom of expression:

> *There are other devices for protecting the individual that are not only consistent with a system of freedom of expression but that would strengthen and vitalize it. The most significant is a right of reply.* * * * It (a right of reply) is particularly applicable in the case of the press where abandonment of the libel action would be felt the most. *Such a procedure is the most appropriate and probably the most effective way to deal with the problem. The person attacked would have an opportunity to get his position and his evidence quickly before the public. He would have a forum in which to continue the dialogue, rather than being forced to withdraw to the artificial arena of the courtroom. The discussion would thus be kept in the marketplace,* and the issues left up to the public, which must make the final decision anyway." Emerson, *supra*, pp. 538-539 (Emphasis supplied.)

Tornillo in this proceeding seeks to use the Florida right of reply statute for exactly the purposes for which

Professor Emerson commends the establishment of a right of reply: He seeks to avail himself of the "opportunity" a right of reply presents to the "person attacked" to bring his position before the public. Unfortunately, appellant here has chosen to deny Tornillo that opportunity and has chosen to confine "discussion" to the courtroom rather than where Tornillo wanted it—"in the marketplace."

A significant fact about the prior legal literature and case law involving right of reply legislation is that all such authoritative discussions have simply assumed the constitutionality of right of reply legislation. Thus, when a question of the construction of the Mississippi right of reply statute, Mississippi Code of 1942, § 3175, came before the Mississippi Supreme Court, the case was not viewed as raising any issues of First Amendment invalidity. See *Manasco v. Walley*, 63 So.2d 91 (Miss. 1953). A reading of the *Manasco* case makes it evident that the state supreme court considered the state right of reply statute entirely constitutional.

Professor Donnelly in his pioneering discussion of right of reply legislation expressed great sympathy for a right of reply on exactly the ground for which Tornillo seeks to enforce the right of reply granted him by Florida law:

> "Manifestly the right of reply makes accessible the means of communication that would otherwise be denied to a person named or designated in the press. The public issues and problems of our time are usually discussed in the terms of the personalities involved. Replies by these persons would provide the community with the divergent views necessary for sound decision-making."

See Donnelly, *The Right of Reply: An Alternative To An Action For Libel*, 34 Va. L. Rev. 867 at 898 (1948).

Other distinguished spokesmen on First Amendment matters have also advocated right of reply legislation on the ground that it would implement, rather than transgress, the First Amendment. See Chafee, GOVERNMENT AND MASS COMMUNICATIONS 183 (1947); The Commission on Freedom of the Press, A FREE AND RESPONSIBLE PRESS pp. 82-106 (1947).

Despite the fact that prior to this case there had been little doubt among those who had addressed themselves to the issue that right of reply legislation was constitutional, a good portion of appellant's brief is devoted to the proposition that "compulsion to print is in direct contradiction to freedom of the press" and that a great wealth of precedent so states. See Appellant's Brief, p. 10. Appellant says that the "theory adopted by the Florida Supreme Court that the First Amendment permits governmental regulation to compel a newspaper to publish against its will has been uniformly rejected by all other courts which have considered the issue * * *." See Appellant's Brief, p. 15. This is entirely incorrect. Not a single case cited by appellant concerns the validity under the First Amendment of a state right to reply statute. The following observation is far more accurate: "While there is no precedent for *Tornillo*, there is also very little authority opposed to it." See Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N. Carolina L. Rev. 1 at 67 (1973).

The *Tornillo* case has nothing to do with that series of cases, which both in the briefs on jurisdiction, and now

in the briefs on the merits, the appellant, and their allied *amici*, never tire of citing: cases where the courts have declined to judicially fashion through interpretation of the First Amendment a right of access to the privately owned press. *Chicago Joint Bd., Amalgamated Clothing Workers v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), cert. den., 402 U.S. 973 (1971), is the paradigm case of this type.

Chicago Joint Board did not involve a statutorily conferred right of reply, but instead, it concerned an effort to establish a First Amendment based duty to publish editorial advertisements. Even more significantly, the federal district court in *Chicago Joint Board Amalgamated Clothing Workers v. Chicago Tribune Co.*, 307 F.Supp. 422 (N.D. Ill. 1969), implied that it might have reached a different result if the legislature were to have passed a right of access statute: "If, in fact, concentrations of private media power are stultifying, the appropriate approach to secure a right of access would be by 'experimental, innovative legislation' or Constitutional Amendments." *Id.* at 429.

In *Chicago Joint Bd. Amalgamated Clothing Workers v. Chicago Tribune Co.*, 435 F.2d 470, 473 (7th Cir. 1970), the plaintiff union based jurisdiction on 28 U.S.C. §§1331 and 1343(3): "because the factual allegations (of the complaint) require a conclusion that the defendants' rejections of its editorial advertisement involved state action." The entire opinion of the Court of Appeals in *Chicago Joint Board* was devoted to the conclusion that refusal to take the ads was *not* state action. In other words, the case failed for lack of jurisdiction. The case is thus completely without any substantive First Amendment significance for the resolution of the issues presented by this case.

Reliance ~~by~~ appellant on *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971) is similarly misplaced. There, advertising was rejected on a theory which predicated a duty to publish the advertising in question on a duty derived from the First Amendment itself. Private newspapers were held to have no First Amendment obligations. The case was, therefore, decided on exactly the same lack of jurisdiction state action point on which *Chicago Joint Board* was determined. Unlike this case, no statute in *Associates & Aldrich Co.* conferred any rights of publication. Statements made in such cases to the effect that publishers enjoy absolute property rights, and that the meaning of freedom of the press is completely limited to those owning media outlets, are clearly *dicta*.[1]

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[1]A recent indication that judicial reaction to the contention that newspapers are exclusively private and are always to be considered without public interest obligation is not shared by all the federal courts of appeal is found in *Herald Co. v. Seawell*, 472 F.2d 1081 (10th Cir. 1972). In that case, in the context of a shareholder's derivative suit, which sought to force the sale of a locally owned newspaper to a chain newspaper, the United States Court of Appeals made the following observation:

> "Basic in many of the rules of law pertaining to the relationship between officers and directors of a corporation and the corporate stockholders is the motive of profit for the corporation. *A corporation publishing a newspaper such as the Denver Post certainly has other obligations besides the making of profit. It has an obligation to the public, that is, the thousands of people who buy the paper, read it, and rely upon its contents. Such a newspaper is endowed with an important public interest.* It must adhere to the ethics of the great profession of journalism. The readers are entitled to a high quality of accurate news coverage of local, state, national, and international events. The newspaper management has an obligation to assume leadership, when needed, for the betterment of the area served by the newspaper. *Because of these relations with the public, a corporation publishing a great newspaper such as the Denver Post is, in effect, a quasi-public institution.*" *Id.* at 1094-1095 (Emphasis supplied).

Another case on which appellant relies, *Avins v. Rutgers*, 385 F.2d 151 (3rd Cir. 1967) did have state action present since Avins sought publication in a state university law review, but otherwise the case is clearly inapplicable. The *Avins* case was not a right of reply case nor even an access case; Avins conceded that he would publish the article in question in some law review:

> "He (Avins) says that he has published articles in other law reviews and will sooner or later be able to publish in a law review the article here involved." 385 F.2d 151 at 153.

The appellee, Tornillo, is in quite a different position than the plaintiff was in *Avins*. His need for a response to an editorial attack in the forum which attacked him, rooted as it is in a need to satisfy the electorate's need for debate on public issues, raises a claim of far higher First Amendment dimension. Tornillo seeks to respond to an attack. Reply, not access, is what Tornillo seeks. Moreover, Tornillo does not ask for the acceptance of a new theory of First Amendment protection in order to give him that reply but rather he seeks the enforcement of a statute which has been part of the Florida Electoral Code since 1913.

There is still another reason why *Avins* is without force in this case. *Avins* is the one case where the claimant for a First Amendment-based duty of publication lost, when state action was present. A number of recent cases have recognized a duty on the part of state supported institutions and state supported school and college newspapers to publish editorial advertisements on a non-discriminatory basis. See *Lee v. Board of Regents*, 306 F. Supp. 1097

(W.D. 1969); *aff'd* 441 F.2d 1257 (7th Cir. 1971), *Zucker v. Panitz*, 299 F.Supp. 102 (S.D.N.Y. 1969); *Kissinger v. New York City Transit Authority*, 274 F. Supp. 438 (S.D.N.Y. 1967); and *Wirta v. Alameda-Contra Costa Transit Dist.*, 68 Cal.2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967).

In *Lee v. Board of Regents, supra*, the United States Court of Appeals for the Seventh Circuit held that state college newspapers could not reject advertisements protecting racial discrimination or the Vietnam War, as they had wished to do, in light of the fact that the paper was open to commercial and other types of ads. The contrast between *Chicago Joint Board* and *Lee v. Board of Regents* has been described as follows:

> "The fortuitous fact that a school newspaper is published with public funds gives a school community larger rights than can now be claimed by the readership of a daily newspaper, despite the community's dependence on the latter and despite the governmentally conferred advantages such as mailing rates. A simplistic dichotomy between private and public is seriously affecting the exercise of First Amendment rights. The serious and ludicrous results of this distinction can be appreciated when it is realized that what a labor union was unable to gain from four Chicago newspapers — recognition of a duty to publish — was in fact obtained by a small group of school children from a high school newspaper." See Barron, FREEDOM OF THE PRESS FOR WHOM? 36 (Indiana University 1973).

In this case, there is no state action problem; Florida, acting to secure a legitimate police power interest, the purity of the electoral process, has statutorily imposed a limited right of reply on candidates attacked by newspapers during a political campaign. Neither the *Chicago Joint Board* line of cases nor the *Lee v. Board of Regents* line of cases is directly applicable to the resolution of the issues raised by this case. But the doctrine of *Lee v. Board of Regents, supra,* and its kindred cases, cited above, does suggest that the alleged administrative and "chilling" difficulties in judicially enforcing a limited right of reply statute, such as the one here, may be greatly exaggerated. If rights of publication can be conferred on the publicly supported press as a matter of constitutional duty, the case for upholding a carefully construed right of reply statute should be even more compelling.

Ignoring its own admonition about incautiously applying precedents from the field of broadcast regulation to the quite distinct problems raised by this case,[2] appellant nevertheless, places great reliance on this Court's decision in *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 36 L.Ed.2d 772 (1973).

The *CBS* case held that the force of the First Amendment did not require the broadcast networks to abandon

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[2]See appellant's discussion of *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) in its brief, pp. 20-24. Appellant here warns against assuming that the "fairness doctrine" applies to newspapers. Appellee has never made any such contention. It is appellant who keeps trying to intrude the "fairness" doctrine into this case and it is the appellee which has the task of reminding appellant, and the *amici*, who have joined them that the only issue before this Court is the constitutionality *vel non*, of the Florida right of reply statute. F.S. §104.38.

their policy of refusing to sell time to political groups and parties for the dissemination of views about ideas. Whatever *dicta* in *CBS* appellant chooses to take comfort in, the plain fact is that the *CBS* decision like all the other "precedents" appellant cites is a state action case. This Court held in *CBS* that so long as neither Congress nor the FCC did not forbid or require the networks to adopt any specific policy with regard to the sale of broadcast time for the dissemination of ideas, network policy on that subject was private action and, therefore, removed from the realm of constitutional obligation.

It would be completely erroneous to read the *CBS* case as saying that government may never legislate to encourage free debate. Chief Justice Burger did state that, assuming *arguendo* the presence of state action, it was not necessary to interpret the First Amendment or the "public interest" language in the Federal Communications Act to create a limited right of access to buy editorial advertising. Creation of such a right was unnecessary, this Court said, because of the existence of the fairness doctrine. The significance of this reasoning lies in the fact that Chief Justice Burger, speaking for this Court, resoundingly reaffirmed the fairness doctrine, and in defining it, gave it a vigorous and affirmative thrust. There is nothing in the *CBS* case to support the view that government may not legislate to further free debate. Furthermore, Chief Justice Burger for the Court specifically reserved decision on whether an FCC prohibition on a blanket refusal to take editorial advertising in broadcasting would be constitutional:

> "We do not reach the question whether the First Amendment or the Act can be read to preclude the Commission from determining that in some situations the public interest requires licensees to re-examine their policies with respect to editorial advertisements. The Commission has not yet made such a determination; it has, for the present at least, found the policy to be within the sphere of journalistic discretion which Congress has left with the licensee." *Id.* at 793.

Chief Justice Burger also carefully pointed out that the Court did not decide whether an act of Congress forbidding broadcasters from refusing, as a general policy, to sell time to responsible entities for solicitation of funds and for comment on public issues would be constitutional. The decisive point in *CBS* was that neither Congress nor the FCC had promulgated such a policy. Chief Justice Burger, noting that Congress had rejected some access to broadcasting proposals in the past, still made it clear that the path of Congressional choice was clearly left open:

> "That is not to say that Congress' rejection of such proposals must be taken to mean that Congress is opposed to private rights of access under all circumstances. Rather, the point is that Congress has chosen to leave such questions with the Commission, to which it has given the flexibility to experiment with new ideas as changing conditions require." *Id.* at 795.

All *CBS* can fairly be interpreted to hold is that the electronic media do not, as a First Amendment matter, have a duty to refrain from refusing to sell broadcast time

for ideas. State action was the touchstone of decision in *CBS* as it was in *Chicago Joint Board*. But the constitutional question is entirely different when government by *legislation* creates rights and duties to further free debate. *Cf. Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). In the *Tornillo* case, unlike *CBS*, the validity of the enforcement of a statutory right of reply, whose parameters are clearly visible, is what is in issue. Such a case is therefore devoid of the problems of demarcating boundaries and formulating definitions that are thought to be associated with a case dependent on the development of new constitutional rights by means of judicial interpretation.

In conclusion, there is no shadow on the constitutional status of right of reply *legislation*. There is no body of case law opposed to the constitutional validation of such *legislation*. The truth is, as Professor Emerson has so correctly said, that a right of reply is designed to keep discussion in the "marketplace" where it belongs. See Emerson. The System of Freedom of Expression (1970), pp. 538-539. Specifically, the Florida right of reply statute, §104.38, keeps discussion in the marketplace and furthers that full, fair and free discussion on public issues which it is the central purpose of the First Amendment to protect. See *New York Times v. Sullivan*, 376 U.S. 254 at 270 (1960).

II.

THE FLORIDA RIGHT OF REPLY STATUTE IS ENTIRELY CONSISTENT WITH THE MAJOR PREMISE OF *NEW YORK TIMES V. SULLIVAN:* THE FIRST AMENDMENT SHOULD BE INTERPRETED TO ENCOURAGE "(D)EBATE ON PUBLIC ISSUES"

Florida's right of reply statute is a modest and limited statutory effort to ensure that the electorate is granted the advantage of receiving not only a vigorously expressed attack on a particular political candidate by the local newspaper press but the candidate's response to this attack as well. That a citizen's attempt to use the protections provided by F.S. § 104.38 should have occasioned the frenzied response that it has from the press presents a sad spectacle. The powerful and prestigious media who are the *amici* in this case have benefited greatly from this Court's landmark ruling in *New York Times v. Sullivan*, 376 U.S. 254 (1964), which has conferred on the press an immunity from libel previously unknown in American legal history. Yet appellant, and the media *amici* in this case, have forgotten the major premise of the *New York Times v. Sullivan* case: an attachment to, and insistence on, "debate on public issues."

The significance of the Florida right of reply statute to the encouragement of "debate on public issues" is something, unfortunately, that is not appreciated by the appellant or its media allies. The appellant throughout its brief on the merits refers to the statute as a compulsory publication statute rather than a right of reply statute. It is regrettable in view of the emphasis on debate in *New York*

Times v. Sullivan and kindred cases that appellant should prefer to call a statute which provides a reply by such a pejorative name. A compulsory publication statute might be an appropriate name for a statute which would require a paper to take editorial positions on matters that were contrary to its conscience and beliefs. But the truth is that the *Miami Herald* can still continue to treat Tornillo in the manner of the Soviet Encyclopedia as a non-person. The Florida statute does not require the *Herald* to take editorial positions in Tornillo's favor. All that the statute requires is that if the *Herald* attacks the "personal character" of Tornillo when he runs for office, the *Herald* must allow the voters to hear his side of the debate. It is ironic that so elementary a demand of civilized discourse should provoke a protest that freedom of press and speech are being violated when the fact of the matter is that freedom of expression is being violated not by Tornillo, but by the newspaper which has brought this appeal.

The Florida right of reply statute not only does not abridge content in any way but it promotes public debate. This Court based its decision in *New York Times v. Sullivan*, on the fundamental First Amendment principle that "debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. 254 at 270. One cannot help but be struck at how apposite this entire quotation is to this litigation.

"Attack" which is both "caustic" and "unpleasant" is present here. Tornillo was called by the appellant, among other names, a "czar", and a practitioner of "shakedown statesmanship." The appellant, free from the restraints

of the pre-*New York Times* law of libel, has indeed expressed itself in a fashion which is "vehement" and "robust", and this, from a First Amendment point of view, is as it should be. So much at least of the premise of *New York Times, supra*, has been fulfilled. The person who has not expressed himself is the victim of the editorial attack. It is this interest which has been recognized by the Florida right of reply statute. The realization of this interest is responsive to the *raison d'etre* of the *New York Times* doctrine: "the profound national commitment" to a principle of "debate on public issues." This case illustrates attack aplenty. But, unfortunately, the facts of the case also illustrate the silencing of debate. It is the First Amendment interest in debate which appellant and its allied *amici* are unwilling to recognize.

The Court in *New York Times* said of its extension of new protection to the press "for criticism of official conduct" that it was "appropriately analogous to the protection accorded a public official when *he* is sued for libel by a private citizen." 376 U.S. 254 at 282. Since federal officials had an absolute immunity for their utterances even for those utterances which extend to the uttermost limit of their duties, *Barr v. Matteo*, 360 U.S. 564 (1959), and since the states have similarly extended at least a qualified privilege to their officials, it was only basic fairness to authorize a similar privilege for the "citizen-critic of government." 376 U.S. 254 at 282. When this Court in *New York Times* established a new immunity doctrine for what has been called the public law of libel, this new protection was not given exclusively to the press but to "citizen critics" like Pat Tornillo.

From the point of view of the propriety of the validity of the right of reply legislation here at issue, it should be remembered that although it pleases some of the *amici* to view Tornillo as part of government, it should be remembered that he was not an incumbent, that he was running for office and that the expressed reason for the *Herald's* hostility to him was founded precisely in his role as a "citizen critic of government." In fact, as outspoken advocate of a public school teacher's strike in defiance of the Governor of the State of Florida, Claude Kirk, Tornillo had served a valuable role as a "citizen critic" of government.

The objective of the doctrine of *New York Times* is to encourage participation in public issues and criticism of public institutions by citizen critics whether the "critic" is or is not a journalist. The Court concluded in *New York Times* that since as a general proposition government officials could speak freely within the range of their duties without fear of liability for defamation, citizen critics of government, such as the private press and individuals like Tornillo, should have the same opportunity.

The entire fabric of the *New York Times* doctrine was built on the premise that since officialdom can freely speak with no fear of libel, citizen critics, including members of the free press, should also have the same right. What apparently was not anticipated was that a newspaper given new freedom to participate in debate on public issues would deny it to others in circumstances such as these.

In *New York Times*, the defendant had argued that the constitutional guarantees of freedom of speech and

press were inapplicable because the allegedly "libelous" statements were part of a paid "commercial advertisement" and were thus commercial speech meriting a lower degree of constitutional protection. The Court rejected this argument:

> "The publication here was not a 'commercial' advertisement in the sense in which the word was used in Chrestensen. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." 376 U.S. 254 at 266.

The two replies submitted by Tornillo fulfill each of the informing functions of the editorial advertisement protected by this Court in *New York Times*. The Court offered the following rationale for refusing to view the advertisement there in question as a "commercial" advertisement:

> "Any other conclusion would discourage newspapers from carrying 'editorial' advertisements of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press." 376 U.S. 254 at 266.

This Court should similarly reject appellant's censorship and content restriction arguments for refusing to publish the replies submitted by Tornillo pursuant to the

Florida right of reply law. The reply here at issue provides exactly the kind of "outlet" to persons "who are not members of the press" as did the editorial advertisement *Heed Their Rising Voices* in *New York Times*.

In *New York Times*, the judiciary, a branch of government acted affirmatively, through the process of First Amendment interpretation, to create a doctrine to remove the restraint on expression provided by harsh libel law judgments. In F.S. § 104.38, Florida has acted to remove yet another restraint on expression: the refusal by a paper to provide a right of reply to a political candidate during a campaign. Affirmative legislative action such as the Florida right of reply statute is no less constitutional than the doctrine of *New York Times*. Both the statute and the doctrine are designed to further free expression and debate.

New York Times v. Sullivan, *supra*, made the focal point of the new public law of libel the status of the plaintiff. The assumption was that the libel plaintiff, like the incumbent elected-public-official libel plaintiff in *Times*, would by his status alone be able to secure access for his ideas. The restraint on debate to which this Court specifically addressed itself in *Times* was the inhibiting effect of a large libel judgment in a defendant newspaper. But the restraint on debate which the progeny of the *Times* brought more clearly into focus was that the status of the plaintiff was not a steadfast guarantor of debate.

Cases in this Court following *New York Times* raised doubts along these lines. A case which suggested that some of the assumptions of *New York Times* should be rethought was *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

In *Time, Inc v. Hill, supra*, the opinion for the Court per Mr. Justice Brennan pointedly raised, but did not resolve, the issue of whether the standard of reckless or knowing falsehood "should be applicable both to persons voluntarily and involuntarily thrust into the public limelight."

The fact that those suffering at the hands of the media have difficulty in entering the market place was sensitively discussed in the opinion, concurring in part and dissenting in part, by Mr. Justice Harlan in *Time, Inc. v. Hill, supra.* The *Hill* case presented a particular challenge to the ability-to-secure access assumption of the *New York Times* doctrine since there the persons who objected to an exploitative media use of personal tragedy were private not public persons:

> "First, we cannot avoid recognizing that we have entered an area where the 'marketplace of ideas' does not function and where conclusions premised on the existence of that exchange are apt to be suspect * * *. Here such competition is extremely unlikely for the scrutiny and discussion of the relationship of the Hill incident and the play is 'occasioned by the particular charges in controversy' and the matter is not one in which the public has an 'independent interest.' *It would be unreasonable to assume that Mr. Hill could find a forum for making a successful refutation of the Life material or that the public's interest in it would be sufficient for the truth to win out by comparison as it might in that area of discussion central to a free society.* Thus the state interest in encouraging careful checking and preparation of pub-

lished material is far stronger than in *New York Times. The dangers of unchallengeable untruth are far too well documented to be summarily dismissed.*" 385 U.S. 374 at 407-408. (Emphasis added)

The implications of this excerpt from Justice Harlan's concurrence in *Time, Inc. v. Hill, supra*, are clear: The state may act to rectify a critical malfunction in the marketplace of ideas. The state may act to remedy a situation where it is possible for "unchallengeable untruth" to prevail. Indeed, the *Miami Herald* and all the *amici* who have filed briefs in their behalf in this case are essentially asking to be allowed to attack their prey as they will and to let that attack remain "unchallengeable". Mr. Justice Harlan stressed in his concurrence in *Time, Inc. v. Hill, supra*, that there was a "vast difference in the state interest in protecting individuals like Mr. Hill from irresponsibly prepared publicity and the state interest in similar protection for a public official." There is similarly a great difference between the ability of an incumbent politician to secure permission to respond to criticism in the media, and the ability of a controversial teachers' union leader like Tornillo, who has already aroused the hostility of powerful governmental and media forces in Miami because of his insistence on the collective bargaining rights of public school teachers.

Absent the Florida right of reply statute, Tornillo would be effectively muzzled in Dade County, Florida. The facts in this case illustrate the loneliness of someone in a position like Tornillo's. When Tornillo sought to enforce his right of reply remedy in court, the Attorney General of the state of Florida announced his intention not to de-

fend the statute. On appeal to the Supreme Court of Florida, the local ACLU chapter allied itself with the *Herald*. In this court, the *amici* on behalf of the *Herald* are almost impossible to count. Newspaper and broadcaster trade associations, newspaper chains, and other mass media ownership groups have all joined to protest Tornillo's attempt to enforce the Florida right of reply statute.

The *amicus* briefs in this case call the Florida right of reply law, variously, a "tax", "censorship" and a "prior restraint". But neither the *amici*, nor appellant have much to say about the dislocation the inflation of the *Times* doctrine has created with respect to individual rights of reply, privacy and reputation. Indeed, one of the *amici* in this case, the *Washington Post*, in an editorial on March 13, 1974 entitled "Fiddling With the First Amendment" made the following remarks in commenting on President Nixon's proposals for Right of Reply legislation:

> "The national commitment to robust, uninhibited, political debate encompasses the liberty to criticize, to exaggerate, to vilify, and to defame."

Washington Post, editorial, March 13, 1974, A-26.

Appellee submits, contrary to this position, that the *New York Times* doctrine was not born out of a desire to confer on the press a right to defame those who can no longer recover in damages, but rather out of a desire to encourage the people to engage in criticism and discussion of public issues. Several years after the *New York Times* case was decided, the constitutional inadequacy of an approach to the *Times* doctrine which regarded it as con-

ferring on the press a new right to defame,[1] and nothing else, was described as follows:

> "Purporting to deepen the constitutional guarantee of full expression, the actual effect of the decision is to perpetuate the freedom of a few in a manner adverse to the public interest in uninhibited debate. Unless the *Times* doctrine is deepened to require opportunities for the public figure to reply to a defamatory attack, the *Times* decision will merely serve to equip the press with some new and rather heavy artillery which can crush as well as stimulate debate." Barron, *Access to the Press—A New First Amendment Right*, 80 Harvard Law Review 1641 at 1657 (1967).

In *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), the plurality opinion for the Court made explicit the questions about whether *New York Times* doctrine had

[1]In the *Washington Post* editorial of March 13, 1974, A-26, it was stated: "Or as the Supreme Court said in another case 'it is a prized American privilege to speak one's mind, although not always with perfect good taste on all public institutions.'" Speaking one's mind is indeed a prized American privilege. But no one concerned about freedoom of discussion is challenging the desirability of speaking one's mind. The issue is whether the dominant media in the community can shut out a reply even in those limited and carefully defined situations where a state by statute has provided for it. To be sure, it may be said, as the *Washington Post* reasons in its *amicus* brief in this case that the daily newspaper in a community is not the only forum for expression. The *amicus* brief for the *Post* in this case cheerfully surveys the wreckage of competitive daily newspaper situations across the country and styles the death of these papers "creative destruction." The theory apparently proceeds on an argument that if one can not secure a response in the forum in which one has been attacked, then one should simply get another forum. In a recent case involving a judicial refusal to permit a *private* restraint on expression, a perceptive, and perhaps justifiably scornful, comment was made on this type of reasoning. See *Evans v. American Federation of Television and Radio Artists,*

created a new imbalance in the marketplace of ideas which had been implicit in *Time, Inc. v. Hill, supra.* In *Rosenbloom*, a radio station had made repeated reports that Rosenbloom had been arrested for possessing obscene literature and that the police had seized obscene books. Rosenbloom was acquitted of criminal obscenity charges and brought suit against the radio station for libel. An appreciation of the significance of the plurality opinion in *Rosenbloom* is vital to understanding the constitutional analysis utilized by the Supreme Court of Florida in the decision below. The Supreme Court of Florida in the decision below relied on the guidance provided by *Rosenbloom* for its conclusion that the Florida right of reply statute is constitutional. Such reliance was entirely appropriate. The plurality opinion in *Rosenbloom* not only assumed the constitutionality of right of reply legislation but counseled the states to enact such legislation. In *Rosenbloom*, the assumption found in *New York Times v. Sullivan, supra*, and its progeny, that individuals who were the subject of a press

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354 F.Supp. 823 at 839 (S.D. N.Y.); on appeal to the United States Court of Appeals for the Second Circuit, *sub nom. Buckley v. American Federation of Television and Radio Artists*, Docket no. 73-1667. (In *Evans*, the federal district court held that requiring radio-television commentators to join a union and submit to union discipline as a condition to going on the air was a chilling of the First Amendment rights of broadcast commentators who expressed their personal opinions concerning news and public affairs):

> "Radio and television differ from the press in that the press is open, at least in theory, to all. *Any citizen (if he has Five Million Dollars) is legally free to start a competing newspaper in any of our major cities to set forth his own opinion.* A latter day Paine with a mimeograph machine is deemed to have access to the 'marketplace of ideas' for Constitutional purposes, equal to those who own and control the leading journals of news and opinion. Accordingly, there is no legal requirement for the press to present a 'fair' balance of opinion and analysis. Subject only to the laws of libel, there is not even a requirement of truthfulness and accuracy." (emphasis added)

attack would have recourse to respond in the press because of their status as persons worthy of press attack was frankly challenged by the plurality opinion for the Court. In the years that had elapsed between 1964, the year the *Times* case was decided, and 1971, the year this Court decided *Rosenbloom*, the *Times* doctrine was steadily pushed forward.

The "actual malice" standard which had been applied to the incumbent elected public official (where the assumption of "actual malice" was perhaps strongest) was extended to non-elected officials, *Rosenblatt v. Baer*, 383 U.S. 75 (1966), to public figures, *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and finally, in *Rosenbloom* to "public issues". In *Rosenbloom*, this Court shifted the focal point of the applicability for the new public law of libel from the status of the plaintiff to the content of the defamation. Instead of making the touchstone of constitutional protection in this area the issue of whether the libel plaintiff was a public official or a public figure the plurality opinion for the Court in *Rosenbloom* said the key to the new protection of *New York Times*, and the invocation of the *New York Times* privilege, was whether the content of the alleged defamation involved the ventilation of public issues.

The crucial factor in the recitation of these developments for the resolution of this case is found in the reason the plurality opinion for the Court in *Rosenbloom* decided to depart from the emphasis the prior case law has given to whether a libel plaintiff was in any sense a public personage. The reason, of course, that prior law had such a focus was founded in this Court's implicit assumption in *Times*

that public persons "would be able to attract media attention to counter criticism." The Court in *Rosenbloom* said on this point:

> "Thus the unproved, and highly improbable, generalization that an as yet undefined class of 'public figures' involved in matters of public concern will be better able to respond through the media than private individuals also involved in such matters seems too insubstantial a reed on which to rest a constitutional distinction." 403 U.S. 29 at 46-47.

But the plurality opinion of this Court, in *Rosenbloom*, written by Mr. Justice Brennan, and joined in by Chief Justice Burger and Mr. Justice Blackmun rejected this original implicit assumption of the *Times* doctrine. Although still quite properly adhering to the *Times* emphasis on debate, the Court in *Rosenbloom* gave recognition to the fact that for debate to take place there must be some "ability to respond."

The Court in *Rosenbloom* went on to point out that the way to really assure debate was to provide for right of reply legislation:

> "If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies *in the direction of ensuring their ability to respond*, rather than in stifling public discussion of matters of public concern." 403 U.S. 29 at 47. (emphasis added)

To this comment the Court in *Rosenbloom* appended the following footnote:

> "Some States have adopted retraction statutes or right of reply statutes. See Donnelly, The Right of Reply: An Alternative to an Action for Libel, 34 Va.L.Rev. 867 (1948); Note, Vindication of the Reputation of a Public Official, 80 Harv. L. Rev. 1730 (1967). *Cf. Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969).
>
> One writer, in arguing that the First Amendment itself should be read to guarantee a right of access to the media not limited to a right to respond to defamatory falsehoods, has suggested several ways the law might encourage public discussion. Barron, *Access to the Press — A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1666-1678 (1967). It is important to recognize that the private individual often desires press exposure either for himself, his ideas, or his causes. *Constitutional adjudication must take into account the individual's interest in access to the press as well as the individual's interest in preserving his reputation, even though libel actions by their nature encourage a narrow view of the individual's interest since they focus only on situations where the individual has been harmed by undesired press attention.* A constitutional rule that deters the press from covering the ideas or activities of the private individual thus conceives the individual's interest too narrowly." 403 U.S. 29 at 47 n. 15. (Emphasis supplied.)

Appellant tries to confine solely to defamation cases the deep concern of the Court expressed in *New York Times v. Sullivan* for the unfettered exchange of opinion and the sympathy for rights of reply expressed by the plurality opinion in *Rosenbloom* to libel. But even professed critics of rights of access and reply realize that these cases cannot be so limited: "Although technically a decision restricting the traditional power of the states to impose sanctions for libel, *New York Times* undoubtedly does support the Florida Court's concern for a 'free flow of information.'" See Lange, *The Role of the Access Doctrine in the Regulation of Mass Media: A Critical Review And Assessment*, 52 N. Car. L. Rev. 1 at 64 (1973). The underpinning which *New York Times v. Sullivan* and *Rosenbloom* provides to the decision below is a rational and necessary one.

If one examines this Court's plurality opinion in *Rosenbloom* closely, it is clear that the Court's opinion did not limit the approach to right of reply legislation to libel cases. Thus the Court suggests the states "ensure their ability to respond" in order that private citizens will be able adequately to respond to "*publicity* involving them." Note that the Court does not say "defamation involving them" but "publicity" — a much broader term and a term incidentally even broader than the limitation to "attack" provided in the Florida right of reply statute. See 403 U.S. 29 at 47.

This Court spoke with even greater clarity, however, in *Rosenbloom* on this point:

> "*Constitutional adjudication must take into account the individual's interest in access to the press as well as the individual's interest in pre-*

> *serving his reputation*, even though libel actions by their nature encourage a narrow view of the individual's interest since they focus only on situations where the individual has been harmed by undesired press attention." 403 U.S. 29 at 47 n 15. (Emphasis supplied.)

In this passage, the Court expresses support for the creation of a remedy by the states which would take into account the individual's interest in access to the press as well as his interest in preserving his reputation. The Court makes it clear that its remarks urging the enactment of right of reply legislation were bred out of larger concerns than merely to afford a right of reply to the libel plaintiff, important as that interest undoubtedly is.

Appellant complains that appellee has not asked for a libel remedy. Similarly appellant complains that appellee did not ask for a retraction. Instead, appellant says appellee chose to bring a proceeding to enforce the Florida right of reply statute. See Appellant's Brief, p. 5. The implication is that this choice was somehow improper. Appellee used the right of reply statute because under the *New York Times v. Sullivan* doctrine it is doubtful if a libel remedy would have been available to him. The Florida right of reply statute was the only legal resource open to someone in Tornillo's situation. Even if Tornillo had chosen to bring a defamation action, the Florida retraction statute would not have served the First Amendment rights of Tornillo and the Miami community as effectively. The merit of a state right of reply statute over a state retraction statute in a case like this was cogently set forth by this Court's opinion in *Rosenbloom:*

> "While the argument that public figures need less protection because they can command media attention to counter criticism may be true for some very prominent people, even then it is the rare case where the denial overtakes the original charge. Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story." 403 U.S. 29 at 46.

The years that have elapsed since this Court's decision in *New York Times* reveal the following development: the removal of the governmental restraint on the press provided by the "actual malice" standard, although designed to secure vigorous debate on public issues has, to some extent, been checkmated by private censorship. The appropriate and constitutional corrective to that censorship is the right of reply conferred by Florida Statute § 104.38.

This case bears compelling witness that freeing newspapers from libel litigation does not in itself produce debate:

> "The irony of *Times* and its progeny lies in the unexamined assumption that reducing newspaper exposure to libel litigation will remove restraints on expression and lead to an 'informed society.' But in fact the decision creates a new imbalance in the communications process." Barron, *Access to the Press—A New First Amendment Right*, 80 Harv. L. Rev. 1641 at 1657 (1967).

The plurality opinion in the *Rosenbloom* case is awake to the realization that freeing the press from heavy libel

judgments in matters involving public issues does not necessarily produce debate. The opinion is similarly sensitive to the concept that new immunities may require new responsibilities.

The Florida right of reply statute is exactly the carefully drawn limited right of reply statute which the plurality opinion in *Rosenbloom* suggested the states enact in order to provide a remedy for the person attacked who is otherwise unable to "counter criticism in the media."

Application of the statute in controversy, as precisely limited — *i.e.*, replies to editorial attacks — shows that the issues in the case dwell at the very center of the core of interests which this Court considered worthy of protection in *New York Times*. Florida Statute § 104.38 provides assurance that the voters get a two-way exchange of opinion. The statute ensures that during a campaign voters have the benefit of both the editorial attack on a candidate and the candidate's reply to the attack. The replies to the editorials in this case involve speech concerning public affairs. This Court has properly said with regard to such expression: "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 376 U.S. 64 at 74 (1964).

For the foregoing reasons, appellee contends that F.S. § 104.38 adds to debate, adds to content, and in no way subtracts from expression. Appellee further contends that F.S. § 104.38 is directly responsive to the heavy emphasis given to the free interchange of opinion on issues of public affairs evident in the decisions of this

Court from *New York Times v. Sullivan*, to *Rosenbloom, v. Metromedia.*

It is not necessary for this Court to decide whether state legislators could constitutionally enact a right of reply statute broader than the carefully circumscribed statute, whose scope has been narrowly construed, by the decision below. It is similarly not necessary to resolve whether courts through the process of constitutional interpretation could judicially fashion a right of reply to fit these facts. This case only presents the issue of whether the First Amendment is offended when a state has chosen, as Florida has, to provide a statutory right of reply remedy to meet the precise and limited facts of this case. Appellee contends that the First Amendment is served and not violated by F.S. § 104.38. Appellee has attempted to show that the Florida right of reply statute is itself profoundly responsive to the "profound national commitment" to "debate on public issues." Appellant concludes on the basis of the foregoing analysis that F.S. §104.38 is completely harmonious with that commitment.

III.

THE FLORIDA RIGHT OF REPLY STATUTE IS A PERMISSIBLE REGULATION OF FREEDOM OF THE PRESS BECAUSE OF THE OVERRIDING STATE POLICE POWER INTEREST IN ASSURING FAIR AND HONEST ELECTIONS

Even apart from the contention that the Florida right of reply statute implements the First Amendment, an independent ground for sustaining the statute lies

in the fact that it is a permissible regulation of freedom of the press. The primary objective of the statute is to assure the integrity of the election process and to provide for a fair exchange of information during an election campaign. The legislative history of §104.38 reveals no intent to regulate content but demonstrates instead a comprehensive effort to assure open government and open political campaigns. See Keen, *Brief History of Corrupt Practices Act of Florida*, 9 Fla. L.J. 297 (1935). The statute is best understood as an integral part of Florida's electoral code.

§104.38 is but one of the many ways by which the Florida Legislature has sought to insure free and fair elections. Thus, it has enacted F.S. §104.011 et seq. prohibiting corrupt election practices. Among other practices forbidden by Florida in the interest of free and fair elections are:

False swearing in connection with any election: F.S. § 104.011.

Paying a person to register or vote: F.S. § 104.012; § 104.071.

Perpetrating a fraud in connection with an election: F.S. § 104.041.

Neglect of duty by public employees charged with administration of elections: F.S. § 104.051; § 104.11.

Corruptly influencing a vote: F.S. § 104.061.

An employer influencing an employee in connection with voting: F.S. § 104.081.

Illegal voting: F.S. § 104.14; § 104.081.

Disclosing how an elector votes: F.S. § 104.23.

Betting on election results: F.S. §104.25.

Expending more than certain amounts in an election campaign: F.S. § 99.161.

Similarly, F.S. §104.271 prohibits any candidate from falsely stating that another has violated certain election laws. F.S. § 104.31 prohibits certain public employees from engaging in political activities. Until its repeal in 1965, F.S. § 104.34 prohibited one candidate from publishing any attack on his opponent within 18 days prior to an election. F.S. § 104.35 prohibits all candidates from distributing election literature against any other candidate on election day. F.S. § 104.36 prohibits all persons from distributing any political literature within 100 yards of any polling place on election day. F.S. § 104.37 requires the authors of all political advertisements to sign same thereby alerting the public as to the source of the material, and this statute provides that if newspapers print political advertisements, they are also required to publish the name of the political party with which the candidate is affiliated. A regulation of the press, designed like § 104.38 to provide for the fullest and fairest public debate is F.S. § 104.372, which prohibits a newspaper from charging a candidate, for political advertising, ". . . a rate in excess of the regular local rate regularly charged . . . ". Nor may the newspaper charge one candidate more than it charges another.

Considered in its statutory setting, the compelling State interest animating § 104.38 and the legislative purpose behind it are therefore entirely clear: F.S. § 104.38 was enacted, not to censor the press and not to abridge

content; but as part of a legitimate police power objective to provide for free and fair elections.

The Supreme Court of Florida in the decision below has fairly distilled the legislative purpose behind § 104.38:

> "The statutory provision, the constitutionality *vel non* which is being questioned in the instant cause, was enacted not to punish, coerce, or censor the press but rather as a part of a centuries old legislative task of *maintaining conditions conducive to free and fair elections.* The Legislature in 1913 decided that owners of the printing press had already achieved such political clout that when they engaged in character assailings, the victim's electoral chances were unduly and improperly diminished. To assure fairness in campaigns, the assailed candidate had to be provided with an equivalent opportunity to respond; otherwise not only the candidate would be hurt *but also* the people would be deprived of both sides of the controversy." App. p. 19.

A plain reading of § 104.38 proclaims its purpose: *It is designed to avoid a hit-run election charge, concocted by one candidate and a friendly dominant newspaper.* The Legislature in F.S. § 104.38 gave the victim candidate of a hit and run charge in the press, a limited opportunity to respond in the same forum where the attack against him arose.

If the publisher's First Amendment rights are deemed to be incidentally restricted, it has long been held that First Amendment guarantees are not absolute and

may be incidentally burdened or restricted to serve an overriding or compelling state interest.

As Mr. Justice Blackmun observed in the Pentagon Papers case, *New York Times v. United States*, 403 U.S. 713 at 761 (1970):

> "The First Amendment, after all, is only one part of an entire Constitution."

Chief Justice Burger said to similar effect:

> "Only those who view the First Amendment as an absolute in all circumstances — a view I respect, but reject — can find such cases as these to be simple or easy." *Id.* at 748

A law review analysis of the opinions in the Pentagon Papers case has also derived from that case the principle that the majority of the members of this Court share the view that some legislative restriction on First Amendment rights is permissible:

> "On the other hand, the Court has never held the first amendment to be an absolute, and instead *has* consistently recognized that *substantial countervailing state interests may outweigh the value of expression.*" *The Supreme Court, 1970 Term*, 85 Harv. L. Rev. 3, 205 (1971)

Examples of state statutory regulation of the press are far from unique. In the Appendix to this brief are nine separate categories of state legislation regulating

freedom of the press to some extent. This legislation breaks down into the following categories:

(1) Paid political advertisements

(2) Anonymous publications

(3) Legal Publications

(4) Lotteries

(5) Electioneering In Vicinity of Polling Places

(6) Advertisements for Divorce

(7) Retraction and Mitigation of Damages

(8) Crimes Involving Sex

(9) Boycott Statutes

A comparative study of this body of legislation reveals that much of it establishes absolute restrictions on content. This is particularly true with regard to the state legislation in categories 2, 5, 6, and 8. Thus, some state legislation absolutely prohibits press publication of specified anonymous publications; other legislation absolutely prohibits various forms of expression in the vicinity of polling places. Similarly, there are extant state restrictions on publishing advertisements for divorce, as well as state legislative prohibitions barring the reporting of names of victims in sex cases. The legislation summarized above can, like § 104.38, be defended against a charge of First Amendment infringement, since each such class of state legislation affecting the press can be justified by an overriding state police power purpose. For example, state restraints on reporting names of victims of sex crimes can be justified by the overriding state interests in protecting privacy of those persons as against the right

to know of the public. *Cf. Cox Broadcasting Corp. v. Cohn*, 200 S.E.2d 127 (Ga. 1973) which is now on review before this Court. (No. 73-938 juris post.) The state interest in an atmosphere of tranquility and in the prevention of unfairness by a restraint on political expression at the polling site arguably overrides an absolute right to exercise First Amendment liberties.

The distinguishing feature of the Florida right of reply statute, § 104.38, which makes it unlike all the legislation described above, is that it serves an independent and overriding police power objective, the integrity of the election process, and yet *does not* abridge content but instead adds to it. In this sense, the implementation of First Amendment values and police power purpose coalesce in the Florida right of reply statute. If § 104.38 effects some incidental restriction on the freedom of the press of publishers, it also serves to fulfill the exercise of First Amendment rights of "citizen critics" like Tornillo. The assurance of fair and free debate which the statute provides gives particular strength to the position that § 104.38 is valid because it serves a compelling state interest.

In support of an argument that § 104.38 cannot be so justified, appellant relies on a recent Massachusetts opinion, the *Opinion of the Justices*, 298 N.E. 2d 829 (Mass. 1973) in which the Supreme Judicial Court of Massachusetts declared a statute requiring publication of political advertising unconstitutional. Under the proposed statute, a newspaper would have been required to print paid political advertising of a candidate if the paper had already accepted a political advertisement from another candidate for the same public or political office. The pro-

posed statute also would require newspapers to publish political ads on issues to be submitted to the voters if the paper had already accepted advertising on another position with regard to the same issue.

The Supreme Judicial Court of Massachusetts stated "First Amendment freedoms may be constitutionally abridged if the governmental regulation furthers an important or substantial government interest . . . " at 834. But the Court apparently concluded that governmental interest had not been sufficiently demonstrated to result in a conclusion of constitutionality with regard to the proposed statute:

> "However, *compulsion to publish all responsive political advertisements*, applicable to all newspapers and other publications of general circulation in the Commonwealth *goes beyond what is essential to the furtherance of any interest of a State in its citizens having a right* of access to newspapers in order to express, at their expense, political ideas which otherwise would not be published. See Barron, Access to the Press — A New First Amendment Right, 80 Harv. L. Rev. 1641, 1676-1678." *Id.* at 835 [Emphasis added]

With respect to the implications of this excerpt for the resolution of this case, it certainly appears to be clear that the Supreme Judicial Court of Massachusetts did not exclude the possibility that *some* state interests might be sufficient to constitutionally authorize the enactment of a state statute providing a right of access to newspapers to their citizens to express "political ideas which

otherwise would not be published." The page references in the law review article to which the Massachusetts Supreme Judicial Court refers, makes this precise point. Thus, it is stated there that the enforcement of a "right of access, whether created by a court or legislature" must be "carefully defined." It is also suggested that the key to validity of a carefully limited right of access statute is "whether the material for which access is sought is indeed suppressed and underrepresented by the newspaper." Barron, *Access to the Press — A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1676-1677 (1967).

Can there be any question that Tornillo's replies in the *Miami Herald's* editorials were "suppressed" in this case?

The state interest furthered by the statute involved in this case, and demonstrated by the *facts* of suppression of expression in this case, is far greater than the abstract issue presented to the Massachusetts Court for an advisory opinion. The Florida right of reply statute deals with the hit-and-run charge. If there is an editorial blunderbuss aimed at a candidate, the statute equips the candidate with the armor of reply.

Appellee submits that when a paper editorially puts its powers of persuasion and prestige against a candidate during an election, the state interest in assuring that the public has the benefit of the candidate's response, raises a claim of a higher First Amendment dimension, and a more substantial state interest than was the case with the proposed Massachusetts statute.

The essential distinction between the proposed Massachusetts statute and the Florida right of reply statute is that the right of reply is only furnished by Florida after the paper itself has launched an attack on a candidate. The legislative interest in protecting against one-sidedness when the prestige and power of a dominant daily newspaper is directed against a political candidate is far stronger than the state's interest in political ads to one candidate but not another.

In light of the foregoing, appellant submits that 104.38 should be upheld even if this Court should conclude that the statute does in some measure infringe freedom of the press as newspaper publishers conceive that freedom. In *Pittsburgh Press Co. v. The Pittsburgh Commission on Human Relations*, ____ U.S. ____, 37 L.Ed.2d 699 (1973), this Court upheld an order of the Pittsburgh Commission on Human Relations (as modified by state Courts) which forbade newspapers from, with some exceptions, carrying "help-wanted" advertisements in sex-designated columns. This Court rejected the contention that this ban on so designating "help wanted" ads was a prior restraint. The Court concluded that this regulation of freedom of the press was permissible because the speech at issue was "commercial speech." Nevertheless, the restriction which was upheld did directly restrict content even though that content was described as unprotected "commercial speech." If the order of the Pittsburgh Human Relations Commission restricting press content is valid, this regulation, also serving a valid police power purpose is *a fortiori* constitutional since it subtracts nothing from the realm of free expression but adds to it.

In *Branzburg v. Hayes*, 408 U.S. 665 (1972), this Court made it very clear that its refusal to establish a newsman's privilege authorizing newsmen to refuse to testify before a grand jury in no way restricted state legislatures "to recognize a newsman's privilege, either qualified or absolute." 408 U.S. 665 at 706 (1972). Such newsman's shield legislation obviously would have to arrive at an accommodation between the police power interest in securing the integrity of the grand jury process and the claim that freedom of the press demands some protection for newsman's privilege. If it be said, that state Shield law legislation is valid because it aids freedom of the press, appellee responds: Precisely so. § 104.38 also serves a legitimate police power interest of the state and aids freedom of the press.

In conclusion, appellant submits that even if § 104.38 is deemed to restrict freedom of the press, the statute should be upheld because of the compelling state interest served by a statute designed, as is § 104.38, to assure free and fair debate between a candidate and the press during a political campaign. Finally, appellate submits that, in this context, the constitutional status of § 104.38 is unique since it fulfills a legitimate police power and at the same time serves at least some First Amendment objectives. In some circumstances, the strength of the police power purpose should prevail against a claim of incidental First Amendment restriction by the appellant newspaper publisher.

IV.

THE FLORIDA RIGHT OF REPLY STATUTE, F.S. §104.38, IS NEITHER IMPERMISSIBLY VAGUE NOR UNNECESSARILY BROAD

Some of the *amici* have tried to portray this case as a proceeding involving criminal penalties. The *Miami Herald* in its petition for rehearing to the court below had urged precisely the same argument: §104.38 was a criminal statute and as such failed to meet the constitutional standards of precision required of such statutes. However, in its decision denying the petition for a rehearing, the Supreme Court of Florida specifically foreclosed this argument in this proceeding. The Supreme Court of Florida pointed out that Tornillo did not seek a "criminal penalty" and, further, that the "validity *vel non* of the criminal penalty is not here involved." See App. p. 39.

The vagueness objections to the statute urged by appellant are without force. This is a civil, not a criminal action. Thus, reliance by appellant on cases involving criminal prosecutions such as *Winters v. New York*, 333 U.S. 507 (1948) is misplaced.

The decision below denying the *Miami Herald's* petition for rehearing stressed the civil nature of this action:

> "As was emphatically stated in the opinion of this Court, the *action underlying this cause before us is a civil action*, which was filed in the Circuit Court for the Eleventh Judicial Circuit seeking to require appellee to publish appellant's reply

pursuant to Florida Statute §104.38, and for damages." App. p. 39. (Emphasis added.)

"Even had this Court found the statute, the constitutionality *vel non* which is being questioned *sub judice*, not to be sufficiently definite and specific to support a criminal penalty, this criminal penalty provision would not be fatal to the statute because the statute is so constructed that *the criminal penalty can be easily severed and deleted and still leave a complete legislative expression establishing a civil right to damages.*" App. p. 40. (Emphasis added.)

Amid much talk of "chilling peril" and "pre-publication peril," appellant does acknowledge that "criminal penalties" are simply not involved in this case and that only civil remedies, the right of reply or damages, are involved. See Appellant's Brief, p. 36. Still appellant contends that the spectre of a damage action renders a "chill" because of the doubts that perplex appellant concerning the meaning of the statute's language.

As the Supreme Court of Florida, in the decision below, has acutely pointed out, the Florida retraction statute, §770.02,[4] contains statutory language virtually identical to

[4]§770.02 Correction, apology, or retraction by newspaper. If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case shall recover only actual damages.

that employed in the Florida right of reply statute, §104.38. The terms "conspicuous place" and a "full and fair correction" in the retraction statute are no more nor less precise than "any reply" or "personal attack" in the right of reply statute. F.S. §770.02 works to the financial advantage of publishers by removing, if the statutory requirements are met, the threat of punitive damages. As a result, no vagueness objections have been raised to the equivalent of the furor which now surrounds F.S. §104.38. But the fact that a statute serves the public interest in furthering debate in the political process should not be allowed to serve as a disincentive to comprehending otherwise clearly understandable statutory language. The Supreme Court of Florida, in the decision below, denied the *Miami Herald's* petition for rehearing and pointed out that the state retraction statute, similar in language to the right of reply statute, has not only been upheld against constitutional attack but has been quite readily used by Florida newspaper publishers when it suited their financial advantage:

> "A comparable statute to Florida Statute, §104.38, F.S.A., requiring a full and fair correction, apology, and retraction to be published in the same editions or corresponding issues of the periodical in which said article appeared, and in as conspicuous place and type as was said original article, as an abatement of the publisher's liability for punitive damages, was held constitutional by this Court in *Ross v. Gore*, 48 So.2d 412 (Fla. 1950). *Courts have generally regarded this type of statute to be in aid of a free press.* We take judicial notice that this statute has been

> frequently used to avoid punitive damages apparently with no adverse effect to newspaper publishers. But, indeed, the statute has been utilized to their financial advantage."
> App. pp. 41-42. (Emphasis added)

In this civil proceeding to enforce the Florida right of reply statute, the appellant newspaper publisher, in the view of the appellee, has a choice: either publish a full and fair correction or respond in damages. The choice offered newspaper publishers between being subject to liability for damages or publishing a retraction is not unique to Florida, it is the common pattern of retraction statutes in the American states. Just as the retraction statute procedure is neither chilling to First Amendment rights nor void for vagueness, so the very similar right of reply procedure which is enforced in a civil proceeding under Florida Statute §104.38, is also not open to these objections.

Despite the fact that the vagueness precedents appellant cites are derived from cases involving criminal proceedings, and despite the persuasive analogy between Florida's civil retraction statute and this civil proceeding to enforce a right of reply pursuant to Florida Statute §104.38, the appellant insists that the Florida right of reply statute is defectively vague. Appellant says that among the "vagueness" problems with the statute are six principal questions. See Appellant's Brief, pp. 34-35. Appellee will therefore examine each of these "vagueness questions", *seriatim*, in order to show that the answers to these "questions", insofar as they relate to the facts, have been vividly clear to the appellant from the very beginning of this controversy:

1. Appellant asked with professed mystification: "What is a newspaper"? We doubt that appellant is in any serious doubt as to whether *it* is a newspaper under §104.38. Obviously, it is a newspaper. What other print media are covered by that statutory "term" in F.S. §104.38 remains for later decision by the appropriate state judicial forum. To raise a "vagueness" objection on these facts as to whether the *Miami Herald* is a newspaper is disingenuous to say the least.

2. Appellant says it is very bewildered as to the meaning of the statutory term "columns". Does that term include, it asked for example, news articles as well as editorials? Appellant should not be permitted to escape from its obligation of providing a response to appellee in a controversy which it precipitated by raising questions of statutory interpretation not presented by this case. Whether or not the term "columns" as understood by the Florida legislature in 1913 was, as we might fairly suspect, limited to editorial columns, that is certainly the posture of this case before this Court. Whether the statutory terms "columns" should receive a more inclusive interpretation than "editorials" would be a matter for state judicial determination in a case which raised such an issue. The facts of this case, however, do not require any ruling broader than a holding that the statutory term "columns" clearly embraces "editorials" and, therefore, the statute was properly invoked by Tornillo in this case.

3. The next conundrum that appellant raises concerns the meaning of the statutory terms "assailing the personal character" of a political candidate or an "attack" upon his official record. Appellant says in its brief, and apparently with a straight face, that it is not clear to

them whether their editorial abuse of Pat Tornillo, with its suggestion of venality, constituted an attack on Tornillo's personal character. In the appellant's editorial of September 29, 1972, the appellant accused Tornillo of "shakedown statesmanship" and then made this final statement:

> "Give him public office, says Pat, and he will no doubt live by the Golden Rule. Our translation reads that as more gold and more rule." (App. p. 8).

Even if one's sensibilities are sufficiently dulled to be unable to see in such language an attack on "personal character", appellant itself has provided the reason as to why there can be no doubt as to the applicability of the statutory term "attack on personal character", to the editorials in question. The Supreme Court of Florida has itself authoritatively characterized this kind of editorial commentary as a personal attack meriting a reply. See App. p. 16. In fact, appellant itself has conceded this characterization on the very page of its brief where it raises a vagueness challenge to the meaning of the statutory term, assailing or attacking "personal character". Appellant's brief, p. 35, fn. 81. In the light of this construction and this concession, it is impossible to find a serious question of "vagueness" lurking in the issue of whether the abuse heaped on Tornillo by appellant constitutes an attack on "personal character" under F.S. §104.38.

Appellant also asks whether judges could seek a right of reply under the Florida right of reply statute. Appellant has made this a matter of more than academic interest since it has devoted considerable editorial space to denounc-

ing the decision below. However, it is entirely inappropriate for either of the parties in this proceeding to ask this court to resolve an issue which is in no way raised by the facts of this case and which, in any case, must be first passed on by the Florida courts.

4. Appellant raises the question whether a candidate must be specifically named in order to be entitled to a right of reply under §104.38. Here again this question is entirely irrelevant to this proceeding. Both the *Miami Herald* editorials in question mentioned Pat Tornillo specifically by name. See App. pp. 5 and 8.

5. This question inquires into the meaning of the statutory requirement that publication of the reply be in an equally "conspicuous" place. Is page four more conspicuous, asks appellant, than page five? The answer to this is short and clear. Tornillo would have been happy to have his reply printed in any page of the *Miami Herald* including the last page. Surely, a party which has steadfastly refused to give *any* reply at all to a candidate as required by statute should not be permitted to suggest that it refused to publish a reply because it didn't know what page to print the reply.

6. In this question appellant argues that the statute presents questions on "how lengthy a reply may be made." This again raises an issue not presented by these facts. A cursory glance at Tornillo's replies will show that they took no more space than the *Herald's* editorials. See App. pp. 6 and 9.

Further, the appellant makes the astonishing statement that if an editorial were to say "John Doe is not fit

for office" it would not enhance serious public discussion to permit John Doe to say: "I am fit for office." Surely the community will benefit (to say nothing of Doe's interest in his good name) if Doe is permitted to deny such a bald and unsubstantiated allegation. In fact, this hypothetical exposes the essence of appellant's case: serious public discussion is enhanced if a newspaper may make a bald and unsubstantiated charge against a candidate but if the person so pilloried wishes to reply in so many words, such a reply violates the First Amendment. Just to state this position is to underscore its unfairness, and its inability to grasp the significance of the high place unfettered debate on public issues has been accorded by the First Amendment decisions of this Court.

Appellant in its specification of questions designed to show a "vagueness" defect in the statute has resorted to conjecturing a parade of horribles. An examination of this parade shows that those questions of statutory construction which are really raised by the facts are readily answerable. As to other hypothetical statutory construction issues which might possibly be used in the future to support even the slightest "vagueness" argument, it is not appropriate to adjudicate such issues before the authoritative gloss of the state Supreme Court has been obtained in cases squarely raising these issues.[5]

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[5]Only a partial interpretative gloss has been given by the Florida Supreme Court; all that was deemed necessary to decide the case before it:

> "Because of the longstanding policy of this Court to give a statute, if reasonably possible, a construction supporting its constitutionality, we hold that the mandate of the statute refers to 'any reply' which is wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slan-

The complete answer to appellant's fanciful questions with regard to § 104.38 was provided in an opinion of this Court, delivered by Mr. Justice Frankfurter, in *New York v. United States*, 326 U.S. 572 at 583 (1946):

> "The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. Nor need we go beyond what is required for a reasoned disposition of the kind of controversy now before the Court."

In connection with its vagueness argument, appellant says that a limiting construction should not be used in interpreting § 104.38, since here the statute allegedly "chills" First Amendment rights. Thus, appellant says the statute should be voided. See Appellant's Brief, p. 33. Appellant has not told us how this statute "chills" First Amendment rights. However, early in Appellant's Brief we are told that newspapers, in order "to avoid" the "compulsion" to publish replies "will restrict or eliminate publication of criticism and comment on political candidates." The effect of a right of reply statute will be to "suppress rather than enhance public debate." Appellant's Brief, p. 9.

The argument then is that rather than comply with a law that they believe wrong, even if it is declared con-

---

derous of the publication nor anyone else, nor vulgar nor profane." App. p. 30.

The Florida Supreme Court concluded that:

"We do not believe that Florida's statutory right of reply is lacking in any of the required standards of preciseness. The statute is sufficiently explicit to inform those who are subject to it as to what conduct on their part will render them liable to its penalties." App. pp. 28-29.

stitutional, newspapers will retreat from public issues rather than "surrender their editorial freedom". If even the limited form of fair play required by §104.38 were to be required, we are told, newspapers would rather not play at all.

If an editorial could warrant a reply, newspapers will simply choose not to print the reply: no attack; no reply. This, apparently, is the "chill" that the right of reply statute at issue in this proceeding places on First Amendment rights according to appellant.

The "chilling effect" concept arose from this Court's famous decision in *Dombrowski v. Pfister*, 380 U.S. 479 (1965). In *Dombrowski*, this Court held that plaintiffs were entitled to an injunction to prevent state officers from prosecuting, or threatening to prosecute them under an unconstitutional statute. Such threats were quite properly held to result in the unconstitutional "chilling" of First Amendment rights.

It is a disservice to the values protected in *Dombrowski*, and the "chilling effect" concept associated with that case, to suggest that it supports a view that debate should be silenced. Certainly there is a "chilling effect" if one knows that in order to engage in protected political expression or activity, one might have to go to jail before one could obtain judicial relief to set the conviction aside. But surely it tortures the meaning of words, and ignores the theory of knowledge behind the constitutional guarantee of freedom of speech and press, to say: I will no longer say what I wish because if I did, I might have to let my opponent speak and I would rather be silenced forever than give my adversary the only effective forum he might ever have.

Finally, additional and persuasive authority for concluding by analogy that a civil proceeding under Florida Statute §104.38 is possessed of the requisite statutory precision and is in no way impermissibly vague may be found in this Court's unanimous and landmark decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). In that case, the Supreme Court reviewed a constitutional attack, on vagueness, among other grounds, on the FCC's fairness doctrine and personal attack rules. The personal attack rules, 32 Fed. Reg. 11531, 33 Fed. Reg. 5362, are as follows:

> "*Personal attacks; political editorials.*
>
> (a) When, during the *presentation of views* on a controversial issue of public importance, *an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group*, the licensee shall within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) *an offer of a reasonable opportunity to respond over the licensee's facilities.*" (Emphasis added.)

The Florida right of reply statute (F.S. §104.38) states as follows:

> "*Newspaper assailing candidate in an election; space for reply.*
>
> If any newspaper in its *columns assails* the *personal character* of any *candidate* for nomina-

> tion or for election in any election, or charges said candidate with *malfeasance or misfeasance in office*, or otherwise *attacks his official record*, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as *conspicuous a place* and in the *same kind of type* as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall, upon conviction, be guilty of a misdemeanor in the first degree, punishable as provided in §775.082 or §775.083. (Emphasis added.)

We contrast the personal attack rules and the Florida right of reply statute to show that the reach of the former is much broader than the latter. The personal attack rules may be invoked by "the person or group attacked". The response provided by the personal attack rules is thus far more broadly available than the limitation of the Florida right of reply statute to political candidates. The grounds for invoking the rules on the basis of attacks on "integrity" similarly appear more extensive. Further, the personal attack rules may be invoked not merely during a political campaign as is the case with the Florida Statute, but "during the presentation of views on a controversial issue of public importance." Despite the broad reach of the personal attack rules, this Court unanimously held them to be entirely consistent with the First Amendment. The Court's comments on the inadmissibility of a vagueness attack on the application of the personal attack rules to the facts in *Red Lion* are equally apposite here:

"The litigants embellish their First Amendment arguments with the contention that the regulations are so vague that their duties are impossible to discern. Of this point it is enough to say that, judging the validity of the regulations on their face as they are presented here, we cannot conclude that the FCC has been left a free hand to vindicate its own idiosyncratic conception of the public interest or of the requirements of free speech. Past adjudications by the FCC give added precision to the regulation; there was nothing vague about the FCC's specific ruling in *Red Lion* that Fred Cook should be provided an opportunity to reply." 395 U.S. 367 at 395 (1969).

Similarly there is nothing vague about the Supreme Court of Florida's "specific ruling" that Pat Tornillo's right to enforce an "opportunity to reply" under §104.38 is both clear under the statute and may constitutionally be pursued. In addition, Mr. Justice White's observation in *Red Lion* that future vagueness problems in the application of the personal attack rules should be solved by future adjudications is entirely pertinent here. The vagueness "issues" conceived by appellant do not arise from these facts and should be left for resolution to those future cases, if any, which raise them.

This Court's refusal in *Red Lion* to permit *in terrorem* vagueness objections based on hypothetical situations not presented by the facts is equally decisive of the vagueness objections that have been made here:

"We need not approve every aspect of the fairness doctrine to decide these cases, we will not

> pass now upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, *United States v. Sullivan*, 332 U.S. 689, 694 (1948), but will deal with those problems when and if they arise."
> 395 U.S. 367 at 395.

An important and necessary note on appellant's vagueness arguments must be made with regard to appellee's use of *Red Lion* in this, and other respects, in this case. *Red Lion* has been relied on by appellee here, and by the Court below, because its ruling on the vagueness issue and its observations on the true nature of First Amendment protection are relevant to the constitutional issues raised in this proceeding. *Red Lion* was not cited by the Supreme Court of Florida, nor is it cited by appellee here, to even remotely suggest that a fairness doctrine be established for the press. Both the *amici* and the appellant have sought to intrude a pseudo-issue into this case: whether the fairness doctrine should be applied to the press. No such contention has ever been urged by appellee in this case. The issue is far narrower, the constitutionality *vel non*, of Florida's narrowly construed state right of reply statute, whose application is limited to newspaper attacks on political candidates during political campaigns.

In conclusion, it is evident from the foregoing that this non-criminal proceeding to enforce the statute in question, §104.38, is in no sense objectionable on a "vagueness" basis. The statute is narrowly drawn, and its operative terms have been precisely defined and interpreted by the Supreme Court of Florida in the decision below.

V.

THE INCIDENTAL USE OF PRIVATE PROPERTY BY F.S. §104.38 FOR THE EXERCISE OF FIRST AMENDMENT RIGHTS DOES NOT DEPRIVE APPELLANT OF PROPERTY WITHOUT DUE PROCESS OF LAW

Amicus *Washington Post* contends that F.S. §104.38 takes a newspaper's property without due process of law, and, therefore, constitutes an invalid taking. The introduction of this issue into this case at this time constitutes a new matter on appeal and as such, is not, strictly speaking, before the Court. The Supreme Court of Florida noted the issue was not raised by the parties, and then declared that there was no basis in the argument that §104.38 constituted an invalid taking:

> *"Although apparently not raised before the trial court, the brief of Amicus Times Publishing Co. has raised the issue that Florida Statute, 104.38, F.S.A., is a deprivation of property right without due process. With this contention, we can not agree.* Florida Statute 104.38, F.S.A., is a valid exercise of the state police power enacted to assure the integrity of the electoral process. * * *
>
> "We find this argument of deprivation of property rights by being required to furnish free space to be without merit. See *Miller v. Schoene, supra; Marsh v. Alabama*, 326 U.S. 501, at 506 * * *; *Red Lion Broadcasting v. FCC, supra; Rosenbloom v. Metromedia, supra; Chronicle Publishing Co. v. Attorney General.* 94 N.H. 148, 48 A.

2d 478 (1946); *Amalgamated Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308 * * *" App. p. 31. (Emphasis added).

Appellant apparently appreciates the difficulties in lodging a "taking" argument against §104.38 at this juncture since no such contention was brought by it below. Accordingly, appellant in its brief on the merits in this Court makes only one reference to the "taking" issue—in a footnote. See Appellant's Brief, p. 31 fn. 68. In order to establish a "taking" in this case, the requirement of proof would have to be satisfied; a remand would have to be ordered on the point and a trial held on the merits.

Despite the serious procedural objections to the consideration of the "taking" claim, appellee believes that it should make clear its view that ascribing a wrongful "taking" to §104.38 is groundless as a matter of constitutional law and is another example of the upside down view appellant, and allied *amici*, take of some of the basic constitutional issues in this case. If anyone in this proceeding has a right to claim a wrongful "taking," it is appellee, Tornillo, whose good name and personal character have been attacked by appellant, the *Miami Herald*, a newspaper with the largest circulation of any daily newspaper in Florida. With the advent of the new public law of libel, the appellee no longer has any effective right to secure redress for the injury to his reputation in the form of a libel action. In this sense, the *New York Times* doctrine works a taking that has behind it the force and permission of the state. Yet despite this forced "taking" of his reputation, it is urged by *amicus Washington Post* that §104.38 works a taking on the newspaper when the statute requires that a reply be afforded to Tornillo in order to assure that

no injury is done to the community interest in debate. One would think that the addition of such a reply would add an economic increment to the value of appellant's newspaper rather than the contrary.

A state statutory requirement of newspaper space for reply for a political candidate assailed by the paper is no more an invalid taking than is any incidental governmental regulation which affects property. In *Miller v. Schoene*, 276 U.S. 272 (1928), Mr. Justice Stone said for the Court:

> "And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property." *Id.* at 279-280.

The principle of *Miller v. Schoene, supra*, is that a police power regulation which incidentally affects property is not, because of that incidental effect, rendered unconstitutional. Professor Joseph L. Sax observed in his influential article on takings under the police power that when a statute makes "an improvement of the public condition through resolution of conflict within the private sector of society, compensation is not constitutionally required." See Sax, *Takings Under the Police Power*, 74 Yale L. J. 36, 67 (1964).

The present case between two private parties, the *Miami Herald* and Pat Tornillo, is an example of the resolution by statute of a private conflict designed to secure, through assuring fair and free debate, an improvement in the public condition.

Even though precedents involving "taking" may be considered helpful, such cases are not the true guide to the resolution of an issue concerning whether §104.38 places an unconstitutional economic burden on appellant. First Amendment cases in this Court beginning with *Marsh v. Alabama*, 326 U.S. 501 (1946) offer far more relevant authority. Particular stress should be placed on Mr. Justice Black's wise counsel in *Marsh* in this regard: "Ownership does not always mean absolute dominion." *Id.* at 506.

The truth is that there is no basis for the contention that when First Amendment rights are exercised, compensation must be paid if property rights are slightly infringed as a result of their exercise. In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), one of the issues that propelled the case to the Supreme Court was whether an individual should be given *free time* to reply under the FCC's personal attack rules. (This Court so held.)

This Court's unanimous opinion in *Red Lion* does not contain the slightest suggestion that the provision of free time under either the fairness doctrine or the personal attack rules was an invalid "taking". If the response to the foregoing emphasis on *Red Lion* as a precedent is that broadcasting is a regulated industry, it should be pointed out that although frequencies are licensed on a three-year basis, the licensee, however, has the right to sell broadcast time and the FCC has no jurisdiction, and has never asserted jurisdiction, over the rates charged by broadcast licensees.

It should be kept in mind that a free space requirement is even less of a burden for a newspaper like the *Miami Herald* than the free time requirement was for a

broadcaster like the Red Lion Broadcasting Co. Broadcast time, unlike newspaper space, is finite. A newspaper is infinitely expandable. If advertising business is up, the paper can put out a larger edition. This is not the situation in broadcasting where the broadcast day is necessarily limited. A grant of free time is a more costly matter to the station manager in broadcasting than is a grant of free space by the newspaper publisher. Yet the Court of Appeals in *Red Lion* considered the free time requirement as a reasonable burden. It is an even more tolerable burden as applied to the press.

The United States Court of Appeals in *Red Lion*, 381 F.2d 908 (D.C. Cir. 1967) considered and rejected the argument that the provision for free reply time under the personal attack rules and the fairness doctrine was unconstitutional:

> "* * * I readily agree that the compulsory granting of free time may, and probably does, impose a burden on the licensees. This burden, however, is not an unreasonable one." *Id.* at 926.

Judge Tamm concluded his opinion in *Red Lion* with the following definitive ruling on the free time issue:

> "Under the facts in this case, the requirement under the Fairness doctrine that a broadcaster may not insist upon financial payment by a party responding to a personal attack does not violate the first and fifth amendments to the Constitution nor is the Doctrine violative of either the ninth and tenth amendments." *Id.* at 930.

Legislative restrictions on the press which affect in an incidental way the ability of newspapers to charge for space are not unprecedented.

Florida has a statute which forbids a newspaper from charging a candidate for political advertising "a rate in excess of the local rate regularly charged". F.S. §104.372. Also, under that statute the newspaper may not charge one candidate more than it charges another. A New Hampshire statute similar to F.S. 104.372 was specifically upheld by the New Hampshire Supreme Court which refused to rule that regulation of the rates a newspaper could charge for advertising space was a violation of the First Amendment. See *Chronicle Publishing Co & Gazette v. Attorney General*, 94 N.H. 148, 48 A.2d 478 (1946).

The legislation described above strives to equalize the position of political advertisers vis-a-vis commercial advertising. F.S. §104.38 tries to equalize a daily newspaper's inherent advantage (in this era of one or two newspaper cities) over the political candidates it dislikes. Both types of legislation (non-discriminatory political advertising rate statutes and right of reply statutes) fulfill rather than offend the First Amendment interest in keeping the political process well ventilated.

Another indication that the Florida right of reply statute is not the bizarre anomaly painted by respondent is that one state retraction statute requires the newspaper, upon receipt of demand for correction, to print an adverse party statement *without cost* to him or his representatives. See Ohio Rev. Code Ann. §§ 2739.13 and 2739.14 (1972) concerning correction in the press of false statements previously published.

But the basic factor in evaluating the validity of the free space requirement of a right of reply law is that the concept of private property as an absolute limitation on free expression is not supported by the First Amendment decision of this Court. In *Amalgamated Food Employees, Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), the Supreme Court held that the picketers in that case had a First Amendment right to enter a privately owned shopping center. The Supreme Court refused to permit the defense of private property to shield the use of shopping centers from the exercise of First Amendment rights. In the metropolitan areas that surround our cities, many suburbs lack media facilities specifically serving the local communities. The mass media facilities that serve the whole metropolitan area, on the other hand, sometimes find the problems that beset a specific suburb or neighborhood not of sufficient interest or concern to warrant giving them coverage. Access for communication purposes to the shopping center in the suburban areas of American cities was, therefore, recognized as indispensable in some circumstances.

Mr. Justice Marshall in the *Logan Valley* case said there were some circumstances where "property that is privately owned may, at least for First Amendment purposes, be treated as though it were publicly held." *Id.* 316. The following analysis has been extended to *Logan Valley:*

> "Access to property for purposes of communication is therefore not dependent on whether 'it is ordinarily open to the public.' The underlying concept seems to be that when property is open to the public for every purpose except the pres-

> entation of views unwelcome to the owners, it should be open to the public for that purpose also. This dedication-to-public-use theory has been applied to public property. The remarkable and pioneering feature of the *Logan Valley Plaza* decision is that the Supreme Court applied this theory to private property also." Barron, FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO THE MASS MEDIA (Indiana University Press, 1973) 103.

Since the rendition of the decision in *Logan Valley*, the Supreme Court had decided another shopping center case, *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). In that case, the shopping center, the Lloyd Center in Portland, Oregon, sought to keep out members of an anti-war group who were distributing handbills. The center contended that the Fifth Amendment's prohibition against deprivation of "property . . . without due process of law" would be offended if groups could enter the shopping center to disseminate their views of the owners of the center did not wish to admit them. Although the two federal lower courts had supported the anti-war group's First Amendment claim for entry to the Lloyd Center, the Supreme Court reversed and upheld the property claim of the shopping center owners.

Lloyd Corp. v. Tanner, supra, does not repudiate past decisions. *Lloyd* merely insists on a relationship between the site of the protest and the object of the protest. The anti-Vietnam War activities of the group seeking entry to the Lloyd Center were deemed unrelated to the center in *Lloyd*. Is there a relationship between the object of the protest, the reply to the *Miami Herald*'s editorial attack

on Pat Tornillo, and the site of the protest, the *Miami Herald*? To raise the question is to answer it. Plaintiff Tornillo was replying to an attack on him in editorials by the newspaper in which he seeks to reply. The direct relationship of his response to the newspaper's attack could hardly be more intimate.

It is no more unconstitutional for appellant to be required to give free space to implement First Amendment objectives of debate than it was deemed unconstitutional to rule that privately owned shopping centers may be used for the exercise of First Amendment rights against the wishes of their owners.

It was never suggested in the shopping center cases that payment had to be rendered for the appropriate exercise of First Amendment rights on private property. The suggestion is particularly frivolous with regard to the enforcement of a statutorily recognized right of reply in a situation where the attack invited response.

Early precedents of this Court have not failed to subordinate claims of property to claims of First Amendment right. Only recently this Court, per Mr. Justice Powell in *Lloyd Corp. v. Tanner*, *supra*, pointed out the vital dependence of the *Logan Valley* holding to the doctrine set forth in *Marsh v. Alabama*, 326 U.S. 501 (1946). In *Marsh*, this Court refused to allow the fact that a corporation owned an entire town to legitimize the denial of First Amendment rights in that town. *Marsh* and *Logan Valley* share a common premise: private property is not off-limits to the exercise of First Amendment rights if entry to such property is the only way that those right can be meaningfully exercised. The conferral of a right of

reply on Tornillo and a duty to publish that reply on the *Miami Herald* by F.S. §104.38, the Florida right of reply statute, is completely authorized by the *Marsh-Logan Valley* concept that First Amendment rights are meaningless if their exercise is to be chilled by an incantation: "private property."

If there are only one or two daily newspapers in a community, ownership of them by a publisher must not, and does not, mean that the publisher has absolute dominion over every inch of space within them. If the publisher opens up his pages to abuse a political candidate, surely it is a strange conception of debate or of free expression which would hold that the Legislature is powerless to prevent such a publisher from keeping the political opposition in his community forever mute.

Right of reply statutes do not deprive appellant of property without due process but instead meet a deeply felt need of political candidates for fair debate and reply in the press. Right of reply statutes are badly needed relief designed to provide a forum for dialogue in this bitter and unhappy time.

VI.

THIS COURT DOES NOT LACK JURISDICTION TO REVIEW THE INTERMEDIATE DECISION BELOW, BECAUSE REMAINING ISSUES ARE MORE COLORABLE THAN REAL; AND THE ALTERNATIVE WOULD CONSTITUTE A SERIOUS DETRIMENT TO THE PUBLIC'S FREEDOM OF SPEECH

The *Miami Herald* asserts that if the Florida Supreme Court is "sustained" there will be a "need to return to the trial court for a determination of factual and state law issues." (Appellant's Brief, p. 38, footnote 87). What constitutes these factual and state law issues is unknown, since the only pleading ever filed in this case has been the Appellee's Complaint, which was summarily dismissed by the trial court.

The *Herald's* "hypothetical, horrible possibilities", developed in its brief to emphasize the alleged vagueness of the statute (§104.38), seem to suggest a number of defenses, that if successful, would, on remand and on subsequent trial, constitute separate and adequate state grounds for decision in its favor. Thus, the decision of the Supreme Court of Florida is clearly "intermediate" and under these conditions, the appellee has been obliged to submit that the decision of the Court below was not final for purposes of 28 U.S.C. §1257.

In his response to the jurisdictional statement, the Appellee called upon the *Miami Herald* to concede non-constitutional defenses, and thereby establish 28 U.S.C. §1257 "finality"; *Mills v. Alabama*, 384 U.S. 214 (1966).

The *Miami Herald* pointedly refrained from doing so—relying, rather, upon the *concurring* opinion of Mr. Justice Douglas in *Mills, supra* at 221, wherein it was stated:

> "Indeed, even had Appellant been unwilling to concede that he has no defense—apart from the constitutional question—to the charges against him, we would be warranted in reviewing this case. That result follows *a fortiori* from our holdings that where First Amendment rights are jeopardized by a state prosecution which, by its very nature, threatens to deter others from exercising their First Amendment rights, a federal court will take the extraordinary step of enjoining the state prosecution."

Because of the *Herald*'s truculence, we have examined their potential "factual and state law issues" and (perhaps wishfully) find them to be tenuous and fanciful at best. Civil relief in this cause will of necessity be granted under F.S. §104.38 (if it is found to be constitutional by this Court) on remand and trial if: (1) A newspaper (2) in its columns (3) assails the personal character (4) of any candidate (5) who demands a response in equal or less space than the attack; (6) and the newspaper refuses.

Tornillo feels that each of the foregoing has already been established, despite the absence of honorable concession. (1) The *Miami Herald* is a newspaper. (2) The vehicle of attack was an editorial column and not a news story or syndicated column, etc. (3) The Florida Supreme Court has characterized, and it is the law of this case, that the nature of the attack on Tornillo was such as to assail his personal character. (4) Tornillo was a candidate for public office. (5) Tornillo demanded a reply

that did not exceed the maximum statutory length. (6) Publication of the reply was refused by the *Miami Herald*.

Under these circumstances, there does not appear to be any real issue — other than the constitutional question presented by this appeal.

In *North Dakota State Bd. of Pharmacy v. Snyder Drug Stores, Inc.*, ____ U.S. ____, 42 U.S. L.W. 4035, 4036 (1973), this Court stated:

> "The finality requirement of 28 U.S.C. §1257 which limits our review of state court judgments serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal instrusion in state affairs."

None of these purposes will be violated, if Tornillo assumes the risk that he can prove, or at least survive the trial of, the foregoing issues. Under that assumption there will not be piecemeal review by federal courts of state court decisions; there will be no advisory opinion; there will be no undue intrusion into the affairs of the State of Florida, more properly left to state tribunals.

Even were that not to be the case, this is a cause in which an intermediate ruling—if not disposed of with dispatch, can carry serious public consequences. Right of access to the printed press is an idea whose time has come. As noted in the Appellant's Brief, p. 40, Senator McClellan

has already urged upon the Congress the wisdom of a national right of reply law—presumably similar in some respects to the Florida Statute under review. Just this month, President Nixon has delivered a strong message to the Congress, urging the enactment of a law permitting access to the press as a means of guaranteeing the presentation of both sides of public issues to the American public. While the parameters of such legislation is unknown, this case will obviously have some effect on the existence and scope of such bills. The failure by this Court, to decide this case at this time will create another and unnecessary national quandary.

If the foregoing is speculative, the Florida situation is not. The constitutionality of Florida's law has already been determined for this State. In the forthcoming fall elections in this State, Tornillo and other persons will be running for office at the legislative, executive and judicial levels. Tornillo and many of these persons will again be assailed by newspaper publishers—some intent upon the public good, and others intent upon securing the election of persons friendly to their own interests. In the absence of a ruling from the Supreme Court of the United States, it is reasonable to expect that F.S. §104.38 will be disobeyed. Replies to personal attacks will continue to be wastebasketed; perhaps more so than in the past, since the publishers will now be especially intent on proving their "independence" in the name of the preservation of the freedom for the press. Their excuse will be the absence of a final decision by the Supreme Court of the United States.

But it will be the freedom of speech of the assailed candidates that will suffer. They will be denied their responses in the press; and they will thereby be denied

their audiences. To deny an audience to a speaker is as much a denial of freedom of speech as if he had been physically gagged. Both are reprehensible to First Amendment guarantees of freedom of speech.

Most important, the people of Florida will be denied open debate during a critical election period. The people will be the ultimate losers if this Court fails to give an early decision on the validity of F.S. §104.38—Florida's right to reply law.

In *North Dakota State Bd. of Pharmacy, supra*, a unanimous court accepted jurisdiction over an admittedly intermediate decision, in the absence of technical finality, because, under certain circumstances, "this concept of finality has a 'penumbral area' ". In other words, where First Amendment freedoms suffer, and other national policy considerations hang in balance, reasonable exceptions to the finality rule of 28 U.S.C. §1257 exist and are utilized.

We reluctantly submit (that while Tornillo may, if victorious, still have to face the uncertainties of a state court proceeding) the critical First Amendment issues of this case are "final" and ripe for decision. Not only Florida, but all of the United States awaits and needs this decision. Only then can the citizens of the United States, upon receiving rights of reply in the press, be guaranteed the full measure of their First Amendment freedoms of speech. Only then will it be known that freedom of the press is something more than freedom for the publishers of the press.

For this reason, and to the extent that we are able, the appellee urges the acceptance of jurisdiction of this cause.

CONCLUSION

For the reasons aforesaid, the appellee, Pat L. Tornillo, Jr., urges this Court to accept jurisdiction of the cause, and to affirm the decision of the Supreme Court of Florida, upholding the validity of Florida's right to reply law—F.S. §104.38.

Respectfully submitted.

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PROOF OF SERVICE

I, JEROME A. BARRON, as a member of the Bar of the Supreme Court of the United States, do hereby certify that three true and correct copies of the Appellee's Brief were mailed by United States Mail, this ___ day of March, 1974, to PAUL & THOMSON, Attorneys for Appellant, 1300 First National Bank Building, Miami, Florida 33131; and also by U.S. Air Mail this same date to COHN & MARKS, 1920 L Street, N.W., Washington, D.C. 20036.

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Supreme Court
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MICHAEL RODAK,

In the Supreme Court of the United States

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of
KNIGHT NEWSPAPERS, INC.,
Appellant,

vs.

PAT L. TORNILLO, JR.,
Appellee.

On Appeal from the Supreme Court of Florida

APPENDIX TO BRIEF OF APPELLEE

Statutory Regulation of Printed Media

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CALIFORNIA		X		X	X		X	X	
COLORADO		X	X	X				X	X
CONNECTICUT							X	X	
DELAWARE							X	X	
D. C.									
FLORIDA	X	X	X	X	X		X	X	
GEORGIA							X		
HAWAII									
IDAHO			X		X			X	
ILLINOIS		X	X			X			
INDIANA			X	X	X	X	X		
IOWA		X	X	X	X		X		
KANSAS			X						
KENTUCKY	X	X			X		X		
LOUISIANA		X			X				
MAINE		X			X		X	X	
MARYLAND				X				X	
MASSACHUSETTS	X	X				X	X	X	
MICHIGAN	X			X			X	X	
MINNESOTA	X	X	X		X	X	X		
MISSISSIPPI		X		X					
MISSOURI	X			X	X				

TABLE I (cont.)

	II Pd. Pol. Adv.	III Anon. Pub.	IV Leg. Pub.	V Lotteries	VI Poll. Places	VII Divorce	VIII Retraction	IX Sex	X Boycott
MONTANA	X	X					X	X	
NEBRASKA		X	X	X			X	X	
NEVADA			X		X			X	
NEW HAMPSHIRE		X			X				
NEW JERSEY		X	X				X	X	
NEW MEXICO			X		X				
NEW YORK		X	X		X	X			
NORTH CAROLINA			X	X	X		X		
NORTH DAKOTA	X	X	X	X	X		X	X	
OHIO	X	X	X				X		
OKLAHOMA		X	X	X			X		
OREGON	X	X	X				X	X	
PENNSYLVANIA		X	X					X	
RHODE ISLAND		X						X	
SOUTH CAROLINA	X		X	X	X	X		X	
SOUTH DAKOTA			X		X		X		
TENNESSEE		X							
TEXAS	X	X	X		X		X	X	
UTAH	X	X		X			X	X	
VERMONT		X		X				X	
VIRGINIA	X	X	X		X	X	X	X	
WASHINGTON		X	X	X	X	X		X	
WEST VIRGINIA	X	X	X		X	X	X	X	
WISCONSIN	X	X	X		X		X	X	
WYOMING								X	

TABLE II

STATUTES REQUIRING DENOMINATION OF "PAID POLITICAL ADVERTISEMENTS"

Alabama

Ala. Stat. T.17, §283. (597). Paid advertisement shall be marked as paid advertisement. — All political advertisements appearing in a newspaper shall be marked paid advertisement. Any person who publishes or circulates any campaign literature or political advertisement without the same bearing on its face the name and address of the person or committee causing the same to be published, or any person or the owner of any newspaper who publishes a political advertisement in a newspaper without the same being marked paid advertisement, is guilty of a corrupt practice.

Ala. Stat. T.14, §212. (4134). Advertisements in newspapers and magazines shall be so marked.— If any person, firm, corporation or association, or agent or employee thereof publishes in any newspaper, magazine, or other periodical, any advertisement not clearly marked or labeled "advertisement" at the beginning or end of said advertisement, such person, firm, corporation or association, or agent or employee thereof, shall be guilty of a misdemeanor, punishable as provided in section 211 of this title; but this section shall not apply to advertisements wherein the name of the maker, manufacturer, agent, distributor or salesman of the article or thing advertised, together with the address of said maker, manufacturer, agent, distributor or salesman, is plainly set out in said advertisement.

Arkansas

Ark. Stat. §3-1306. Paid articles in newspaper to contain word "advertisement."—All articles, statements or communications appearing in any newspaper printed or circulated in this State, intended or calculated to influence the vote or any elector in any primary election, and for the publication of which a consideration is paid, or to be paid, to the proprietor or publisher of such newspaper, shall be preceded or followed by the word "Advertisement" in conspicuous letters. [Acts 1913, No. 308, §7, p. 1252; C. & M. Dig., §3901; Pope's Dig., §4896.]

Fla. Stat. §104.37. Political literature, circulated prior to election; requirements.—

(1) All political advertisements and all campaign literature published or circulated prior to or on the day of any election shall be signed by the author thereof, and if the same is being published and circulated by a club or committee, then it shall be signed by the chairman and secretary of such club or committee, and if such literature is in circular form it shall have upon it the name of the printer or publisher. All political advertisements shall be marked "paid political advertisements paid for by .....
....."

(2) All printed political advertisements of candidates running for office in general elections shall bear the name of the political party with which the candidate is affiliated. This provision is intended to be broad in scope and shall include all media such as posters, signs, billboards, cards, circulars, letters, newspaper and magazine advertisements and any other form of advertising. Any circular,

printed material, etc., endorsing or using the name of the candidate, shall expressly set forth in comparable printing whether the permission of the candidate has been obtained permitting this printing.

(3) When any candidate running for office in a general election uses the media of radio or television, it shall be distinctly announced in such broadcasts or telecasts, the name of the political party with which such candidate is affiliated.

(4) It shall be unlawful for any person to publish any circular, advertisement, list of candidates names, or other form of announcement to the public in which the name of any other candidate, group, or organization, is used in support of his candidacy unless prior to such publication the candidate shall have given his specific approval to make such publication. Provided that this section shall not apply to:

(a) Editorial endorsement by any newspaper, radio, or television station or other recognized news media.

(b) Publication by a party committee advocating the candidacy of its nominees.

(c) Publication of sample ballots or partial sample ballots provided that such ballots contain the name of all candidates in their proper order of the races therein mentioned, if a partial ballot contains all races without omission from the top of the ballot to and including the last race shown thereon, and show no indication of preference or recommendation in regard to a candidate shown thereon without his prior specific consent.

(5) Any person who willfully violates the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083. the author thereof. Laws 1959, c. 675, Art. XII, §3.

Kentucky

Ky Stat. §123.095

(2) All advertisements, billboards, handbills, paid-for television and radio announcements and other communications intended to support or defeat a candidate shall be signed or identified by the words "paid for by" followed by the name and address of the committee and the treasurer on whose behalf the communication appears. For television and radio broadcasts compliance with Federal Communications Commission regulations regarding sponsored programs and broadcasts by candidates for public office shall be considered compliance with this subsection. (1968 S. 280. Eff. 6-13-68. 1966 c. 216, §10)

Massachusetts

Mass. Stat. 56, §39. Publishing unsigned political advertisements; marking advertisements.— No person shall publish or cause to be published in a newspaper or other periodical, either in its advertising or reading columns, any paid matter designed or tending to aid, injure, or defeat any candidate for public office or any question submitted to the voters, unless the name of the chairman or secretary or the names of two officers of the political or other organization inserting the same, or the name of some voter who is responsible therefor, with his residence and the street and number thereof, if any, appear therein

in the nature of a signature. Such matter inserted in reading columns shall be preceded or followed by the word "Advertisement" in a separate line, in type not smaller than that of the body type of the newspaper or other periodical. This section shall not authorize expenditures otherwise prohibited by this chapter.

Any corporation violating any provision of this section or section thirty-eight, relative to payments to newspapers and periodicals, and to political advertising, shall be punished by a fine of not more than ten thousand dollars, and any officer, director or agent of a corporation violating any such provision, who authorized such violation, or any person who violates, or in any way knowingly aids or abets the violation of, any such provision, shall be punished by a fine of not more than one thousand dollars, or by imprisonment for not more than one year. Added St. 1946, c. 537, §11.

Michigan

Mich. Stat. §168.914. Newspaper advertising marked; payment for editorials.— Sec. 914. No publisher of a newspaper or other periodical and no director or person responsible for the operation of any other advertising medium shall insert, either in its advertising or reading columns or cause or permit to be disseminated any paid matter which is designed or tends to aid, injure or defeat any candidate or political party or organization, or proposition before the people, unless it is stated therein that it is a paid advertisement. No person shall pay the owner, editor, publisher or agent of any newspaper, periodical or other advertising medium to induce him to editorially advocate or oppose any candidate for nomination or elec-

tion, and no such owner, editor, publisher or agent shall accept such payment. P.A. 1954, No. 116, §914, Eff. June 1, 1955.

Mich. Stat. §168.914a. Paid advertisements as to proposals, naming of sponsors.— Sec. 914a. No publisher of a newspaper or other periodical and no director or person responsible for the operation of any other advertising medium shall insert, either in his advertising or reading columns, or cause or permit to be disseminated, any paid matter which is designed or tends to support or oppose any proposed amendment or amendments to the constitution of this state, or proposition before the people, unless it is stated therein that it is a paid advertisement, and stating the name or names of the persons, organization or organizations paying for such advertisement. P.A. 1954, No. 116, §914a, added by P.A. 1955, No. 192, §1, Eff. Oct. 14, 1955.

Minnesota

Minn. Stat. §211.03. Paid advertisements in newspapers.— No publisher of a newspaper, periodical, or magazine shall insert either in the advertising columns of such newspaper, magazine, or periodical, or elsewhere therein, any matter paid or to be paid for which in intended or tends to influence directly or indirectly any voting at any primary or general election unless at the head of the matter is printed in pica capital letters the words "Paid Advertisement," and unless there is a statement at the head of the matter of the amount paid or to be paid therefor, or a statement that the same is to be paid at regular advertising rates, the name and address of the candidate in whose behalf the matter is inserted and of any other per-

son, if any, authorizing the publication and the name of the author thereof. Laws 1959, c. 675, art. XII, §3.

Missouri

Mo. Stat. T.9, §122.580. Newspaper articles to be marked paid advertisement.— No owner, proprietor, publisher, manager or lessee of any newspaper shall publish or print, or cause to be published or printed, any article, in any newspaper, in advocacy of or in opposition to the candidacy of a candidate for an elective office, which article is paid for, either directly or indirectly, unless such article be conspicuously marked "paid advertisement". No candidate for elective office shall publish or print, or cause to be published or printed, in any newspaper, any article in advocacy of his candidacy or in opposition to an advocacy of the candidacy of any other candidate for an elective office, which article is paid for, either directly or indirectly, unless such article be conspicuously marked "paid advertisement". (R.S. 1939, §6693)

Montana

Mont. Stat. §94-1452. (10798) Publications in newspapers and periodicals.— No publisher of a newspaper or other periodical shall insert, either in its advertising or reading columns, any paid matter which is designed or tends to aid, injure, or defeat any candidate or any political party or organization, or measure before the people, unless it is stated therein that it is a paid advertisement, the name of the chairman or secretary, or the names of the other officers of the political or other organization inserting the same, or the name of some voter who is responsible therefor, with his residence and the street

number thereof, if any, appear in such advertisement in the nature of a signature. No person shall pay the owner, editor, publisher, or agent of any newspaper or other periodical to induce him to editorially advocate or oppose any candidate for nomination or election, and no such owner, editor, publisher, or agent shall accept such payment. Any person who shall violate any of the provisions of this section shall be punished as for a corrupt practice.

North Dakota

N. D. Stat. §16-20-17. Political advertising to be labeled paid.—No publisher of a newspaper or other periodical shall insert either in its advertising or reading columns any paid matter which is designed, or which tends, to aid, injure, or defeat any candidate, political party, organization, or measure before the people, unless it is stated therein that it is a paid advertisement.

Ohio

Ohio Stat. §3599.08. Influencing candidates and voters by publications. (GC §4785-197)

No owner, editor, writer, or employee of any newspaper, magazine, or other publication of any description, whether published regularly or irregularly, shall use the columns of any such publication for the printing of any threats, direct or implied, in the columns of any such publication for the purpose of controlling or intimidating candidates for public office. Such person shall not directly or indirectly solicit, receive, or accept any payment, promise, or compensation for influencing or attempting to influence votes through any printed matter, except through

matter inserted in such publication as "paid advertisement" and so designated.

Whoever violates this section is guilty of a corrupt practice and shall be fined not less than five hundred nor more than one thousand dollars.

Oregon

Ore. Stat. §260.512. Identification of paid political matter published in periodicals; payments for editorial advocacy or opposition.

(1) No publisher of a newspaper or other periodical shall insert, either in its advertising or reading columns, any paid matter that is designed or tends to aid, injure or defeat any candidate, political party or political committee or any measure submitted to the people, unless it is stated therein that it is a paid advertisement. There shall also appear, in the nature of a signature to the advertisement, the name of the person inserting it, with his residence address. No person shall pay the owner, editor, publisher or agent of any newspaper or other periodical to induce him to editorially advocate or oppose any candidate for nomination or election or any measure submitted to the people. No such owner, editor, publisher or agent shall receive such payment.

(2) Violation of this section is a misdemeanor.

South Carolina

S. C. Stat. Ch. 6, §47-573. Candidacy for office; newspaper commendations.— No member of the council

or of the civil service commission of any such city shall hold or be a candidate for any other office without first resigning or at once forfeiting such office in the city government. No officer or candidate in connection with the city government shall directly or indirectly pay for any publication in any newspaper in commendation of his services or in advocacy of his candidacy or in respect thereto or against any other candidate, except under the caption "paid advertisement," and no person publishing or managing a newspaper shall publish for a consideration any commendation, advocacy or condemnation of any officer or candidate for office of such city without stating in such publication the price paid therefor and the person paying it. Any violation of any of these provisions shall be punished by a fine not exceeding five hundred dollars or imprisonment not exceeding one year. (1952 Code §47-573; 1942 Code §§7653, 7673; 1932 Code §§7653, 7673; Civ. C. '22 §4746; Cr. C. '22§529; Civ. C. '12 §3089; 1910 (26) 523; 1929 (36) 154.)

Texas

Tex. Stat. Art. 211, §236. Political advertising. Anything published in newspapers, pamphlet or printed journal in favor of or in opposition to any candidate for any public office or in favor of or in opposition to the success of any public officer, or in favor of any political party, or any proposition submitted to a vote of the people, when the same is published in consideration of the receipt or promise of money or thing of value, shall be known as political advertising. And no such advertisement shall be accepted for publication or printing unless it is signed by the responsible chairman of any candidate's committee, or any candidate himself, political committee, or by the

chairman or representative of any commercial or other organization, or by the individual responsible for its publication, and such signature shall appear in the advertisement as printed. All advertisements of marked ballots, advising or suggesting how voters should mark their ballots shall be included in the meaning of this Article; and any editor, publisher, manager or agent of any newspaper, pamphlet or printed journal who shall publish political advertising other than as advertising matter, which shall be labeled at the beginning or end thereof with the word "advertisement," or who shall wilfully demand or receive for the publication of such political advertising money or other thing of value in excess of the sum due for such service at the regular advertising rates of such newspaper, pamphlet or printed journal, or any person who shall pay, or offer to pay the editor, publisher, manager or agent of any newspaper, pamphlet or printed journal for such service any money or thing of value in excess of the sum due at regular advertising rates, or any person who shall pay or offer to pay any editor, publisher, manager or agent of a newspaper, pamphlet or printed journal any money or thing of value for the publication of political advertising, except as advertising matter, shall be fined not less than Five Hundred Dollars ($500) nor more than One Thousand Dollars ($1,000), or be imprisoned in jail not less than ten (10) nor more than thirty (30) days. Nothing herein shall be construed as applying to announcements of candidates for office. Acts 1905, p. 560, §167; Acts 1935, 44th Leg., p. 709, ch. 304, §1.

Tex. Stat. Ch. 3, Art. 212a. Political advertising, regulations concerning.—Section 1. No newspaper, magazine, or other publication, published daily, biweekly, weekly, monthly, or at other intervals shall sell, solicit, bargain

for, offer, or accept for money, other consideration, or favors, any kind or manner of political advertising from more than one candidate for any or all local, county, State, or Federal offices, unless such publication shall have been published and distributed generally for at least twelve (12) months next preceding the acceptance of the advertising.

Utah

Utah Stat. §20-14-27. Paid advertisements permitted.— No owner, publisher, editor, reporter, agent or employee of any newspaper or other periodical shall, directly or indirectly, solicit, receive or accept any payment, promise or compensation, nor shall any person pay or promise to pay or in any manner compensate any such owner, publisher, editor, reporter, agent or employee, directly or indirectly, for influencing or attempting to influence by means of any printed matter in such newspaper any voting at any election or primary through any means whatsoever, except through the matter inserted in such newspaper or periodical as "paid advertisement" and so designated as provided by law, and the compensation for inserting any such paid advertisement shall in no case exceed the regular rate charged by such newspaper or periodical for such service.

Virginia

Va. Stat. §24.1-276. Publications not to receive compensation for advocating candidacy.— It shall be unlawful for any owner, proprietor, editor, manager, officer, clerk, agent, reporter, or employee of any newspaper, magazine, or periodical printed or published in this Commonwealth

to take, accept or receive, or agree to take, accept or receive, for himself or any other person, firm or corporation, either by himself or any other person or persons, firm or corporation, any money or other valuable consideration for such newspaper, magazine, or other periodical supporting or advocating the election or defeat of any candidate or candidates at any election. Any such owner, proprietor, editor, manager, officer, clerk, agent, reporter, or employee of any newspaper, magazine or other periodical violating the provisions of this section shall be deemed guilty of a misdemeanor. But nothing in this section shall prevent any person or persons, firm or corporation engaged in the publication of any newspaper, magazine or periodical from receiving from any person for publication and publishing any matter, article or articles advocating the election or defeat of any candidate or candidates and receiving from such person a compensation therefor, if such articles so published or printed have placed at the beginning thereof in plain type in black face Roman capitals in a conspicuous place the statement "Paid Advertisement" and comply with the provisions of §24.1-277. (Code 1950 (Repl. Vol. 1969), §24-406; 1952, c. 4; 1970, c. 462.)

West Virginia

W. Va. Stat. §3-8-12. Additional acts forbidden; circulation of written matter; newspaper advertising;

(a) No person shall publish, issue or circulate, or cause to be published, issued or circulated, any anonymous letter, circular, placard, or other publication tending to influence voting at any election;

(b) No owner, publisher, editor, or employee of a newspaper or other periodical shall insert, either in its advertising or reading columns, any matter, paid for or to be paid for, which tends to influence the voting at any election whatever, unless distinctly designating it as a paid advertisement and stating the name of the person authorizing its publication and the candidate in whose behalf it is published;

Wisconsin

Wisc. Stat. §12.14. Campaign matter or political advertisements.

(1) (a) No publisher of a newspaper or other periodical shall publish, either in the advertising column of such newspaper or periodical or elsewhere therein, any matter paid for or to be paid for which is intended or tends to influence, directly or indirectly, any voting at any election or primary, unless at the head of said printed matter is printed the words "Advertisement To Be Paid For" or "Paid Advertisement," as the case is, and the name, given and surname, and address of the candidate in whose behalf the matter is inserted, and of any other person, if any, authorizing the publication and the name, given and surname, of the author thereof.

TABLE III

ANONYMOUS PUBLICATIONS

Alabama

Ala. Stat. T.17 §282. (596) Bills, placards, advertisements, etc., must bear name of committee.—Every bill,

placard, poster, pamphlet, advertisement, newspaper advertisement, cartoon, or other printed matter, having reference to an election, or to any candidate, shall bear upon the face thereof the name and address of the person or committee causing the same to be published. The failure to place thereon the name and address of such person or committee, or the printing or publishing, or circulating of any such printed matter without the same bearing upon the face thereof the name and address of such person or committee, is a corrupt practice.

Ala. Stat. T.17 §284. (598) Cartoons shall bear name of newspaper or executive officer of corporation.—Every cartoon having reference to an election or to any candidate or to any proposition to be submitted to a popular or party vote or to a vote of the legislature of Alabama, shall, if published in any newspaper and not caused to be published therein by some person or committee, bear upon the face thereof the name of the owner or publisher of such newspaper, and if such newspaper is owned or published by a corporation, the name of the principal executive officer of such corporation.

Alaska

Alaska Stat. Sec. 15.55.030. Publication without identification.—A person who knowingly prints or circulates, or has written, printed, or circulated, a letter, circular, bill, placard, poster, or other publication relating to an election or to a candidate at an election or to an election proposition or question without the same bearing on its face, the name and address of the author, printer, and publisher, is guilty of a corrupt practice and upon conviction is punishable as for a misdemeanor. (§11.04 ch. 83 SLA 1960)

Arkansas

Ark. Stat. 3-1412. Publication of political statements or pamphlets without signature unlawful.—No statement, communication, and/or advertisement of a political nature, may be published in a newspaper or other periodical within the State of Arkansas; and no circular, pamphlet, letter, form letter, statement, advertisement, and/or other similar matter of a political nature, may be printed or distributed in this State, unless such statement, communication, advertisement, circular, pamphlet, form letter, mimeographed, printed, duplicated, and/or other similar matter, plainly bears the name or names and post office addresses of the individuals, firms, committees, or other group or groups, sponsoring and bearing the cost of same. If the sponsors thereof be not the same persons, groups, committees, or organizations, bearing the cost thereof, then the names of both the sponsor and those bearing the cost, shall plainly appear upon such advertising matter; and if the sponsor, or sponsors, and/or those bearing the cost thereof, are a group, committee, association, council, or other body, then the names of the three principal officers of such sponsoring and/or paying groups, committees, association, councils, or other bodies, together with the correct post office address of each, shall also be printed thereon. (Acts 1945, No. 261, §1, p. 601.)

California

Cal. Stat. Art. 2 §12047. Unidentified circulars, pamphlets or posters.—Every person is guilty of a misdemeanor who writes or causes to be written, printed, posted, or distributed any circular, pamphlet, letter, or poster which is designed to injure or defeat any candidate

for nomination or election to any public office by reflecting upon his personal character or political action, unless there appears upon the circular, pamphlet, letter, or poster, in a conspicuous place, the name and address of the printer and either:

(a) The name and address of the chairman and secretary or the names and addresses of at least two officers of the political or other organization issuing it; or

(b) The name and residence address, with the street and number, if any, of some voter of this State, who is responsible for it.

Colorado

Colo. Stat. 49-21-50. Anonymous statements concerning candidates.—Any person who willfully publishes or distributes any card, pamphlet, circular, poster, dodger, advertisement, or other writing relating to or concerning any person who has publicly declared or has caused or permitted to be publicly declared his intention to seek election to any congressional, state, district, county, justice precinct, or precinct office in a primary, general, or special election or at a precinct caucus, assembly, or convention of a political party, which does not contain the names of the persons, associations, committees, or corporations responsible for the publication or distribution of the same, and the name of the president, chairman, or responsible official of each such association, committee, or corporation, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished as provided in section 49-21-4(2). This section shall not apply to any person who, by himself or by his agent, publishes or distributes any writing relating to or concerning himself.

Florida

Fla. Stat. 836.03. Owner or editor of the paper also guilty.—Any owner, manager, publisher or editor of any newspaper or other publication who permits any anonymous communication or communications such as is signed otherwise than with the true name of the writer, and such name published therewith to appear in the columns of his publication in which said communication any person is attacked in his good name, or it is attempted to bring disgrace or ridicule upon any person, such owner, manager, publisher or editor shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083. Amended by Laws 1971, c. 71-136, §989, eff. Jan. 1, 1972.

Illinois

Ill. Stat., T.46, §26-1. Anonymous publications relative to candidacy.—It shall be unlawful for any person or group of persons, or any firm, organization, association, league or other body to publish, circulate or distribute any pamphlets, circular, handbill or other printed matter relative to the candidacy of any person or persons seeking nomination or election to any public office unless the same shall bear thereon in plain type the name and address of the person or persons; or the names and addresses of the officers of any firm, organization, association, league or other body causing such matter to be published and distributed and in the event that two or more persons join in causing said matter to be published and distributed then the names and addresses of each of such persons shall be imprinted thereon in plain type: Provided, that if more than ten persons shall join in publishing and distributing

such matter, then it shall be sufficient if the names and addresses of ten of such persons shall be imprinted thereon as aforesaid. And Provided, further, that it shall not be necessary for any domestic corporation, in good standing and organized at least one year prior to publishing such matter, to print as aforesaid more than its full corporate name and address and the name of its chief executive officer. 1943, May 11, Laws 1943, vol. 2, p. 1, §26-1.

Iowa

Iowa Stat. 738.22. Political advertisements.—Whoever writes, prints, posts, or distributes or causes to be written, printed, posted, or distributed, a circular, poster, or advertisement which is designed to promote the nomination or election of a candidate for public office or to injure and defeat the nomination or election of any candidate for public office, or to influence the voters on any constitutional amendment, or to influence the vote of any member of the legislature, unless there appears upon such circular or poster or advertisement, in a conspicuous place, either the name of the chairman or secretary or of two officers of the organization issuing the same, or of the person who is responsible therefor, with his name and address, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not exceeding one hundred dollars, or imprisoned in the county jail not to exceed thirty days, or be punished by both such fine and imprisonment.

Kentucky

Ky. Stat. 123.130. Regulation of printed matter relative to candidates for office.—

1. All written or printed circulars, advertisements or other statements with reference to any candidate or group of candidates for nomination or election to any public office in this Commonwealth shall include the signature and the address of the writer, or if the same purports to be issued by any committee, organization or other similar association, the same shall include the signatures and the addresses of two of the principal officers of the committee, organization, or association.

(1966 c 174 §2. Eff. 6-16-66)

2. Statements, articles or advertisements appearing in newspapers or magazines shall be signed by the writer and contain his address. The management of the newspaper or magazine shall keep a one year record of these signatures and addresses but shall publish this information only upon the discretion of the editor.

(1966 c 174, §2. Eff. 6-16-66)

Louisiana

La. Stat. RS 18, §1531. Identification of person or organization publishing or distributing statement concerning candidate; penalty.—No person shall publish or distribute or cause to be published or distributed any printed, multigraphed, photographed, mimeographed, typewritten, or written pamphlet, circular, card, dodger, poster, advertisement, or any other statement, relative to or concerning any candidate for election or nomination in any primary, general, or special election to any state, parochial, municipal, district, or ward office, unless it contains the name of the person responsible for its publication or distribution.

If an association, organization, committee, or corporation is responsible for the publication or distribution, there shall be included the full and correct names and addresses of all the officers and of its entire membership or shareholders.

Whoever wilfully violates this Section shall be fined not less than one thousand dollars nor more than ten thousand dollars, or imprisoned, with or without hard labor, for not less than one year nor more than ten years, or both.

Maine

Me. Stat. 21, §1575. Identification of political advertisements.—The source of a written or oral advertisement which is designed to promote or defeat a candidate, party or principle must be identified by disclosing as part of the advertisement the name of the person or chairman of the organization which sponsored it.

Massachusetts

Mass. Stat. 56 §39. Publishing unsigned political advertisements; marking advertisements.—No person shall publish or cause to be published in a newspaper or other periodical, either in its advertising or reading columns, any paid matter designed or tending to aid, injure, or defeat any candidate for public office or any question submitted to the voters, unless the name of the chairman or secretary or the names of two officers of the political or other organization inserting the same, or the name of some voter who is responsible therefor, with his residence and the street and number thereof, if any, appear therein in

the nature of a signature. Such matter inserted in reading columns shall be preceded or followed by the word "Advertisement" in a separate line, in type not smaller than that of the body type of the newspaper or other periodical. This section shall not authorize expenditures otherwise prohibited by this chapter.

Any corporation violating any provision of this section or section thirty-eight, relative to payments to newspapers and periodicals, and to political advertising, shall be punished by a fine of not more than ten thousand dollars, and any officer, director or agent of a corporation violating any such provision, who authorized such violation, or any person who violates, or in any way knowingly aids or abets the violation of, any such provision, shall be punished by a fine of not more than one thousand dollars, or by imprisonment for not more than one year.

Minnesota

Minn. Stat. 211.08. Campaign literature matter must include names.—Any person or committee who shall publish, issue, or circulate, or cause to be published, issued, or circulated, otherwise than in a newspaper, as provided in section 211.03, any literature or any publication tending to influence voting at any primary or election which fails to bear on the face thereof the name and address of the author, the name and address of the candidate in whose behalf the same is published, issued, or circulated, and the name and address of any other person or committee causing the same to be published, issued or circulated, and any person, firm, corporation or committee who shall knowingly make or publish or cause to be published, any false statement in relation to any candidate or proposition to be

voted upon, which statement is intended to or tends to affect any voting at any primary or election, shall be guilty of a misdemeanor; provided, nothing herein contained shall be construed as modifying or repealing any of the provisions of section 211.10. Laws 1959, c. 675, art. XII, §8.

Mississippi

Miss. Stat., T.11, §2287. Newspapers and periodicals to print names of their editors.—Newspapers and periodicals published in this state, for regular distribution through the mails or otherwise, shall print at the top of the editorial page of said publication the full name of its chief editor, the assistant editor, if any, or the person or persons directly responsible for the editorial utterances of said publication. The owner or owners of any newspaper or periodical published in this state in violation of this section, shall be guilty of a misdemeanor and upon conviction, shall be fined not more than twenty-five dollars for each offense.

Sources: Codes, Hemingway's 1917, §§1023, 1024; 1930, §1055; Laws, 1912, ch. 156.

Montana

Mont. Stat. 94-1475. Political literature to contain name of officer of organization or person publishing and producing.—It shall be unlawful for any person to publish, print, mimeograph, type or otherwise produce any dodger, bill, handbill, pamphlet or other document which is designed to aid, injure or defeat any candidate or any political party or organization or measure before the people unless it is stated therein the name of the chairman or

secretary, or the names of the other officers of the political or other organization publishing, printing, mimeographing, typing or otherwise producing such dodger, bill, handbill, pamphlet or other document or the name of some voter who is responsible therefor with his residence and street address, if any, together with the name of the publisher, printer or the producer thereof with his residence and street address, if any, or his place of business.

Nebraska

Neb. Stat. 32-1131. Campaign literature; circulation, printing, advertisement; identity of person printed thereon; violation; misdemeanor.—No person, persons, or committee shall print, publish, reproduce or distribute in quantity, nor order to be printed, published, reproduced or distributed by any method any photograph, handbill, pamphlet, advertisement, circular, post card, placard or letter, which contains any statement, notice, information, allegation or other material concerning any political party, candidate, committee, person, proposition or amendment to the state constitution or city charter whether in favor of or against a political party, candidate, committee, person, proposition, or amendment to the state constitution or city charter, in connection with any election including city, county, state, or national primary or general elections of public officers, party officials, candidates for nomination or election for public office, party position, proposition or amendment to the state constitution or city charter without also printing or reproducing thereon legibly the name of the person or committee at whose instance or request such photograph, handbill, pamphlet, advertisement, circular, post card, placard or letter is so printed, published, reproduced, or distributed, and of the persons who ordered

such printing, publishing reproduction or distribution, and no person or committee shall so print, publish, reproduce or distribute or order to be printed, published, reproduced or distributed any such photograph, handbill, pamphlet, circular, post card, placard or letter without also so printing, publishing or reproducing his or its name and residence address thereon including street address, city and state. In the case of an individual or individuals, the name and residence address of any individual responsible for it shall be given. In the case of a committee, the names and residence addresses of at least two committee officers residing in this state shall be given. A violation of the provisions of this section shall constitute a misdemeanor.

New Hampshire

N. H. Stat., 70:14. Political advertising.—All political advertising or literature, in newspapers or other periodicals, on radio or television, on billboards, window cards, circulars, pamphlets, or of whatever nature, shall be signed at the end with the names and addresses of the candidate, his fiscal agent, or the name and address of the chairman or the secretary of a political committee, or the name and address of a voter, according to whether a candidate, political committee, or voter is responsible for it. Said signature thereto shall clearly designate the name of the candidate, party or political committee by or on whose behalf the same is published or broadcast. In the case of printed or written matter, the said signature and address of signer shall be printed or written in a size of type or lettering large enough to be clearly legible.

1. Political advertising printed in newspapers, periodicals, or billboards shall be marked at the beginning

thereof "Political advertising". Persons or corporations operating a radio or television station shall broadcast political advertising only after announcing it as such.

New Jersey

N. J. Stat. 19:34-38-1. Printing and distribution of circulars, handbills, etc.; required statement.—No person shall print, copy, publish, exhibit, distribute or pay for the printing, copying, publishing, exhibiting or distribution or cause to be distributed in any manner or by any means, any circular, handbill, card, pamphlet, statement, advertisement or other printed matter having reference to any election or to any candidate or to the adoption or rejection of any public question at any general, primary for the general, or special election unless such circular, handbill, card, pamphlet, statement, advertisement or other printed matter shall bear upon its face a statement of the name and address of the person or persons causing the same to be printed, copied or published or of the name and address of the person or persons by whom the cost of the printing, copying, or publishing thereof has been or is to be defrayed and of the name and address of the person or persons by whom the same is printed, copied or published.

L. 1963, c. 57, §2, supplementing Title 19, c. 34.

New York

N. Y. Stat., Art. 21, § 330. Publication of owner's name.—1. Every newspaper, magazine or other periodically printed publication published in this state, shall publish in every copy of every issue, upon the editorial page or in one of the first four pages of the publication, the full name

and address of the owner, owners, proprietor or proprietors of such publication; and if said publication shall be owned or published by a corporation, then the name of the corporation and the address of its principal place of business shall be published, together with the full names and addresses of the president, secretary and treasurer thereof; and if the said publication shall be owned or published by a partnership, limited partnership, or an unincorporated joint stock association, then the full names and addresses of the partners, or officers and managers of said partnership, limited partnership or unincorporated joint stock association shall be published in like manner. The representative capacities of those named shall be indicated in like manner.

North Dakota

N.D. Stat. 16-20-17.1. Political advertisements to disclose name of sponsor.—Each and every political advertisement, whether on behalf of or in opposition to any candidate for public office, initiated measure, referred measure or constitutional amendment, and whether such advertisement shall be by newspaper, pamphlet or folder, display cards, signs, posters or billboard advertisements, or by any other public means, shall disclose at the bottom of same the name or names of the sponsors of such advertisement, and the name or names of the person, persons, associations, partnerships or corporations paying for such advertisement, except however, this section shall not apply to campaign buttons. At the close of every radio or television broadcast containing any advertising announcements or talk for or against any candidate for public office, any initiated measure, referred measure or constitutional

amendment to be voted on by the people, there shall be announced at the close of said broadcast the name or names of the person, persons, associations, partnerships or corporations paying for such radio or television broadcast.

Ohio

Ohio Stat. 3599.09. Political communications must be identified; penalty.—(A) No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, unless there appears on such form of publication in a conspicuous place or is contained within said statement, the name and residence address of the chairman or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor, except that when such publication is issued by the regularly constituted central or executive committee of a political party, organized as provided in Chapter 3517. of the Revised Code, it shall be sufficiently identified if it bears the name of the committee and its chairman. No person, firm, or corporation shall knowlingly print or reproduce any notice, placard, dodger, advertisement, sample ballot, or any other form of publication in violation of this section.

A candidate shall not be required to place his address on literature promoting his own candidacy.

Oklahoma

Okla. Stat., T. 26, S 491. Anonymous election literature prohibited—Penalty.—Whoever, other than the candidate himself, writes, prints, posts or distributes or causes to be written, printed, posted or distributed a circular, poster, or advertisement which is designed to injure or oppose the nomination or election of a candidate for public office or to influence the voters on any constitutional or statutory amendment, or any other issue in a state, city, county, or school board election, or to influence the vote of any member of the Legislature, unless there appears upon such circular or poster or advertisement, in a conspicuous place, either the name and address of the person, if an individual, or the name and address of the president, chairman, and secretary, or of two (2) officers of the organization, if an organization, who placed the order for the advertising or had the printing done, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not exceeding Five Hundred Dollars ($500.00) or imprisoned in the county jail not to exceed thirty (30) days, or be punished by both such fine and imprisonment.

Oregon

Ore. Stat. 260.522. Identification of source of political publications.—

(1) No person shall print, publish, post or circulate or cause to be printed, published, posted or circulated through the mails or otherwise any letter, circular, bill, placard, poster or other publication relating to any election or to any candidate or measure at any election, unless it bears on its face the name and address of the publisher thereof.

(2) Violation of this section is a misdemeanor.

Pennsylvania

Pa. Stat. Ch. 3, T. 54, S 64. Names of owner and managing editor on editorial page; names of corporation and president; names of partners to be published.— Every newspaper published in this Commonwealth, whether published monthly, weekly, biweekly, semi-weekly, or daily, or whether such publication is at regular or irregular intervals, shall publish on the editorial page, in a conspicuous position, at the top of the reading matter the name of the owner or proprietor of such newspaper, together with the name of the managing editor thereof. If said newspaper is owned or published by a corporation, then the name of the corporation shall be published, together with the name of the president and managing editor thereof; and if the said newspaper is owned or published by a partnership, or partnerships limited, then the names of the partners and the managing editor shall be published in like manner. 1939, June 12, P. L. 336, S 1.

Rhode Island

R. I. Stat. 17-23.2. Signature of posters and circulars.— No person shall intentionally write, print, post or distribute, or cause to be written, printed, posted or distributed, a circular or poster designed or tending to injure or defeat any candidate for nomination or election to any public office, by criticizing his personal character or political action, or designed or tending to aid, injure or defeat any question submitted to the voters, unless there appears upon such circular or poster in a conspicuous place either the names of the chairman and secretary, or of two (2)

officers of the political or other organization issuing the same, or of some voter who is responsible therefor, with his name and residence, and the street and numbers thereof, if any.

Tennessee

Tenn. Stat. 39-5201. Publisher or person responsible to be named.—Penalty for violation.—The publication and distribution of any circular, poster, hand bill, newspaper, or magazine without the name of the publisher or person responsible for the contents being shown thereon is prohibited.

Any person who shall violate this section is guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than five hundred dollars ($500) nor more than one thousand dollars ($1,000) or imprisoned in the county jail or workhouse for a period of not less than ten (10) days nor more than thirty (30) days, or both in the discretion of the judge.

Texas

Tex. Stat. Art. 211. 236. Political advertising.—Anything published in newspapers, pamphlet or printed journal in favor of or in opposition to any candidate for any public office or in favor of or in opposition to the success of any public officer, or in favor of any political party, or any proposition submitted to a vote of the people, when the same is published in consideration of the receipt or promise of money or thing of value, shall be known as political advertising. And no such advertisement shall be accepted for publication or printing unless it is signed by the responsible chairman of any candidate's committee, or

any candidate himself, political committee, or by the chairman or representative of any commercial or other organization, or by the individual responsible for its publication, and such signature shall appear in the advertisement as printed. All advertisements of marked ballots, advising or suggesting how voters should mark their ballots shall be included in the meaning of this Article; and any editor, publisher, manager or agent of any newspaper, pamphlet or printed journal who shall publish political advertising other than as advertising matter, which shall be labeled at the beginning or end thereof with the word "advertisement" or who shall wilfully demand or receive for the publication of such political advertising money or other thing of value in excess of the sum due for such service at the regular advertising rates of such newspaper, pamphlet or printed journal, or any person who shall pay, or offer to pay the editor, publisher, manager or agent of any newspaper, pamphlet or printed journal for such service any money or thing of value in excess of the sum due at regular advertising rate, or any person who shall pay or offer to pay any editor, publisher, manager or agent of a newspaper, pamphlet or printed journal any money or thing of value for the publication of political advertising, except as advertising matter, shall be fined not less than Five Hundred Dollars ($500) nor more than One Thousand Dollars ($1,000) or be imprisoned in jail not less than ten (10) nor more than thirty (30) days. Nothing herein shall be construed as applying to announcements of candidates for office.

Utah

Utah Stat. 20-14-24. Prohibitions as to publishers, newspapers and other periodicals.—No publisher of a news-

paper or other periodical circulating in this state shall insert, either in its advertising or reading columns, any paid matter which is designated or tends to aid, injure or defeat any candidate, or any political party or organization, or any measure before the people, unless it is stated therein that it is a paid advertisement and the name of the chairman or secretary or other officers of the political or other organizations inserting the same, or the name and address of some voter who is responsible therefor, shall appear in such advertisement in the nature of a signature. No person shall pay the owner, editor, publisher or agent of any newspaper or other periodical to induce him to advocate or oppose editorially any candidate for nomination or election, and no such owner, editor, publisher or agent shall accept such payment.

Utah Stat. 20-14-25. Statement of ownership of publication.—No publisher of any newspaper or other periodical published within this state shall insert, either in its advertising or reading columns, any matter whatsoever of a political nature, or any political editorial relative to a candidate for any public office, unless the publisher thereof shall file in the office of the secretary of state, within three months before the holding of any nominating convention or primary or general election, or within ten days after the calling of and before the holding of any special election, a sworn statement which shall contain the names of the owners of such paper; and, if such publisher is a corporation, such statement shall be executed by some responsible officer thereof who is in a position to know the facts, and shall contain the names and address of the owners of the shares of stock and the bonds of such corporation.

Vermont

Vt. Stat., T. 17, § 2022. Printing or publication of anonymous political literature.—A person who writes, prints, publishes, posts or circulates or causes to be written, printed, published, posted or circulated through the mails or otherwise any letter, circular, bill, placard, poster or other publication relating to any election or to any candidate at any election, unless it bears on its face the name and address of the author and publisher thereof, shall be fined not more than $500.00. However, this section shall not apply to a candidate whose letter, circular, bill placard, poster or other publication identifies himself and promotes his own candidacy. 1963, No. 159.

Virginia

Va. Stat. 24.1-277. Writings concerning candidates for office to identify person responsible therefor.

1. As used in this section "writing" means any pamphlet, poster, card, circular, book, dodger, flyer, banner, handbill, picture, or any other written, printed or otherwise reproduced statement or advertisement of any class or description, but shall not include editorial comment or news coverage which is sponsored and financed by the news medium publishing or broadcasting it.

2. It shall be unlawful for any person to cause any writing other than a television or radio broadcast to appear concerning any candidate for any office elective by the qualified voters unless such writing plainly identifies the person responsible therefor and where the writing is caused by a candidate, carries the statement "by authority of

.....(name)....., duly designated Treasurer of .....(name of candidate)....."; or where the writing is not caused by a candidate, the person causing the writing shall be identified by full name and address on the writing. It shall be unlawful for any person to cause any radio or television statement to appear unless the advertisement or statement contains information which plainly identifies the person or group responsible therefor.

3. It shall be unlawful for any person to use a false or fictitious name or address on any such writing described in the preceding paragraph.

4. Any person violating any provision of this section shall be deemed guilty of a misdemeanor. (Code 1950 (Repl. Vol. 1969), § 24-456; 1956 c. 398; 1970, c. 462.)

Washington

Wash. Stat. 29.85.270. Political advertising—Use of assumed name.—All political advertising, whether relating to candidates or issues, however promulgated or disseminated, shall identify at least one of the sponsors thereof if the advertising is sponsored by other than the candidate or candidates listed thereon, by listing the name and address of the sponsor or sponsors on the material or in connection with its presentation. If a candidate or candidates run for partisan political office, they and their sponsors shall also designate on all such political advertising clearly in connection with each such candidate the party to which each such candidate belongs. The person or persons listed as sponsors of such advertising shall warrant its truth. The use of an assumed name shall be unlawful. Whenever any corporation sponsors political advertising,

the name and address of the president of the corporation shall be listed on the material or in connection with its presentation.

West Virginia

W. Va. Stat. 3-8-12. Additional acts forbidden; circulation of written matter; newspaper advertising.—

(a) No person shall publish, issue or circulate, or cause to be published, issued or circulated, any anonymous letter, circular, placards, or other publication tending to influence voting at any election;

(b) No owner, publisher, editor, or employee of a newspaper or other periodical shall insert, either in its advertising or reading columns, any matter, paid for or to be paid for, which tends to influence the voting at any election whatever, unless distinctly designating it as a paid advertisement and stating the name of the person authorizing its publication and the candidate in whose behalf it is published.

Wisconsin

Wis. Stat. 12.16. Campaign literature must disclose author and candidate.—No person shall publish, issue or circulate or cause to be published, issued or circulated otherwise than in a newspaper, as provided in s. 12.14(1), any literature or any publication tending to influence voting at any election or primary, which fails to bear on the face thereof the given name, surname, and address of the author, the given name and surname of the candidate in whose behalf the same is published, issued or circulated,

and the given name, surname and address of any other person causing the same to be published, issued or circulated.

TABLE IV

STATUTES DEFINING RATES ON "LEGAL PUBLICATIONS"

Alabama

Ala. Stat. T.7 §718(2). Rates to be charged.—Newspapers of this state shall not charge, nor shall any agency required to cause publication to be made pay, more than two cents a word for the first insertion and one and one-half cents a word for each subsequent insertion; provided that the current published commercial rate may be contracted for when the publication is made in a daily newspaper. When any matter or material is required to be published in tabular form, the rate to be charged and paid shall not exceed the nationally published rate. (1953, p. 1087, §2, appvd. Sept. 19, 1953.)

Arkansas

Ark. Stat. §15-104. Rate.—When any law, proclamation, advertisement, order or notice shall be published in any newspaper for the State or for any officer on account of the State or for any county or for any officer on account of any county, or for any legal advertisement for any individual, except real property and personal property delinquent tax lists; there shall be allowed for such publication the following rates: For all matter other than tabular

matter, three cents [3c] per word for the first insertion and two cents [2c] per word for each subsequent insertion, with each separate group of numerals included in such matter to be counted as one [1] word, regardless of the number of digits involved. When tables or tabular matter are included each line of the standard newspaper column shall be considered as containing at least six [6] words. [Act Apr. 14, 1891, No. 157 §3, p. 269; C. & M. Dig., §6805; Acts 1929, No. 92, §1, p. 495; 1933, No. 66, §1, p. 191; Pope's Dig., §8774; Acts 1947, No. 123, §1, p. 295; 1955, No. 60, §1, p. 142.]

Colorado

Colo. Stat. §109-1-7. Rates for legal publications.—For the publication of all legal notices or advertisements required by law or the order of any court of record in this state to be published in newspapers, and including notices of sale for delinquent taxes, the publishers thereof shall be entitled to charge not in excess of eighteen cents for each single-column line of nonpareil, or smaller type, measure not less than ten pica ems wide, for the first insertion, and not in excess of fourteen cents per line for each subsequent insertion; provided, if the body of said notice shall be set in eight point or larger type that the charge for that portion of the notices shall be ten per cent less than if set in nonpareil and five per cent less if set in seven point type. All emblems, display headings, rule work, and necessary blank space shall be calculated as solid type; twelve lines shall be counted to the inch. Any contract providing for payment for such notice at a lesser sum than is provided in this section shall be valid.

Florida

Fla. Stat. §50.061. Amounts chargeable.

(1) The publisher of any newspaper publishing any and all official public notices or legal advertisements shall charge therefor the rates specified in this section without discount, rebate, commission or refund.

(2) The charge for publishing each such official public notice or legal advertisement shall be seventy cents per square inch for the first insertion and forty cents per square inch for each subsequent insertion, except that:

(a) In all counties having a population of more than three hundred four thousand according to the latest official decennial census, the charge for publishing each such official public notice or legal advertisement shall be eighty cents per square inch for the first insertion and sixty cents per square inch for each subsequent insertion.

(b) In all counties having a population of more than four hundred fifty thousand according to the latest official decennial census, the charge for publishing each such official public notice or legal advertisement shall be ninety-five cents per square inch for the first insertion and seventy-five cents per square inch for each subsequent insertion.

(3) Where the regular established minimum commercial rate per square inch of the newspaper publishing such official public notices or legal advertisements is in excess of the rate herein stipulated, said minimum commercial rate per square inch may be charged for all such

legal advertisements or official public notices for each insertion, including notices of all governmental bodies or agencies.

(4) Any person violating provision of this section, either by allowing or accepting any discount, rebate, commission or refund, shall be guilty of a misdemeanor, upon conviction thereof shall be punished by imprisonment of not more than 60 days or by fine not to exceed $300.00 or by both such fine and imprisonment in the discretion of the court.

(5) All official public notices and legal advertisements shall be charged and paid for on the basis of six-point type on six-point body.

(6) The provisions of this section, however, shall not be construed as in anywise affecting the provisions of law concerning the publication of delinquent tax lists.

Idaho

Idaho Stat. §60-105. Rates for official notices.—The rate to be charged for all official notices required by law to be published in any newspaper in this state, by any state, county, municipal official or other person, shall be as follows: two cents (2c) for each pica in a column line for the first insertion and fifteen cents (15c) per column line for each subsequent insertion. For table and figure matter, the rate shall be three cents (3c) for each pica in a column line for the first insertion, and fifteen cents (15c) per column line for each subsequent insertion. In the event that a column line ends in a one-half (½) pica measurement, the rate for such one-half (½) pica shall be

one-half (½) the rate established for a full pica for the type of matter set forth herein. For purposes of this section, a column line shall measure not less than ten and one-half (10½) picas in width and the type used shall not be smaller than 7-point nor greater than 8-point. Use of type smaller than 7-point for official notices is hereby prohibited. [1907, p. 27, §1; reen. R. C. & C. L., §1477; C. S. §2339; I. C. A., §58-105; am. 1951, ch. 29, §1, p. 41; am. 1955, ch. 135, §1, p. 274; am. 1971, ch. 35, §1, p. 80.]

Illinois

Ill. Stat. Ch. 100, §4. When weekly newspaper sufficient—Costs.—When any notice is required by law or order of court, or any contract, and it is not otherwise provided, it shall be sufficient to publish the same in a weekly newspaper, and in no case shall any greater amount be chargeable as costs for the publication of such notice than will be sufficient to publish the same in such weekly newspaper. [1874, Feb. 13, R.S. 1874, p. 723, §4.]

Indiana

Ind. Stat. §49-701 [12077]. Public official or governmental agency—Compensation of publisher—Schedule —Size of type—Proof of publication.—The cost of all advertising, which any duly elected or duly appointed public official or governmental agency is required by law to have published, or orders published, for which the compensation to the newspapers publishing such advertising is drawn from the public treasury of the governmental unit concerned therewith, shall be charged to and collected from the proper fund of the public treasury and paid over to the newspaper and/or newspapers publishing such adver-

tising, after proof of publication and claim for payment has been filed.

The compensation for the publishing of such advertising shall be by the line and shall be computed at the rate of one dollar and fifty cents [$1.50] per square of two hundred and fifty [250] ems for the first insertion and seventy-five cents [75c] per such square for each additional insertion required; Provided, That an additional charge of fifty per cent [50%] shall be allowed for the publication of all such legal advertising containing rule and figure work.

All legal advertisements shall be set in solid type not larger than the type used in the regular reading matter of the newspaper, without any leads or other devices for increasing space. All such advertisements shall be headed by no more than two [2] lines, neither of which shall total more than four [4] solid lines of the type in which the body of the advertisement is set.

Each newspaper publishing legal advertising shall submit proof of publication and claim for payment in duplicate on each such legal advertisement published. For each additional proof of publication required by any public official, a charge of fifty cents [50c] per copy shall be allowed the newspaper or newspapers furnishing such proof of publication. [Acts 1927, ch. 96, §1, p. 252; 1957, ch. 16, §1, p. 28.]

Iowa

Iowa Stat. T.31, §618.11. Fees for publication.—The compensation, when not otherwise fixed, for the publica-

tion in a newspaper of any notice, order, citation, or other publication required or allowed by law, shall not exceed one dollar for one insertion, and fifty cents for each subsequent insertion, for each ten lines of brevier type. In case of controversy or doubt regarding measurements, said controversy shall be referred to the state printing board, and its decision shall be final.

Kansas

Kan. Stat. §28-137. Newspaper fees for legal notices; proof of publications; taxation and collection. Newspapers shall be entitled to receive the following fees:

For publishing any legal notice, or any other proceeding or advertisement required by law to be published in any newspaper, at a rate of not exceeding the following schedule of rates per line: . . . .

Where column widths are other than those shown above, the rate per line of type should be proportionately increased or decreased. Proof of the publication of all such notices shall be made in the manner required by law or the order or citation of court or summons, and each such proof of publication shall be accompanied by a verified statement of the fees and charges therefor. The fees and charges of all such publications when made in any action or proceeding in any court of record, city court or justice of the peace court in this state shall be taxed as costs and collected in the same manner as other costs in said action or proceeding. [K.S.A. 28-137; L. 1968, ch. 177, §1; March 16.]

Minnesota

Minn. Stat. §331.08. Fees for publication of legal notices.—The fee for publication of a legal notice in any legal newspaper in this state shall be $1.80 per folio for the first insertion and $1.20 per folio for each subsequent insertion of a notice. The fees for the publication of the delinquent tax list shall be the same as now provided by section 279.07; provided that in all cases where a notice for publication contains tabular matter in whole or in part, or what is termed "price and one-half" or "double price" composition, an additional fee of 60 cents per folio shall be paid for all such price and one-half and double price composition matter for the first insertion of a notice; and in the publication of official ballots for elections in the counties and the state the same shall be measured as though the entire space occupied is that of solid brevier or eight-point type, and no additional fee shall be allowed on account of tabular matter. As amended Laws 1947, c. 318, §1; Laws 1949, c 111, §1; Laws 1957, c. 443, §1; Laws 1965, c. 819, §1.

Nebraska

Neb. Stat. §33-141. Legal notices; rates.—The legal rate for the publication of all legal notices shall be sixteen cents a line, single column, standard newspaper measurements for the first insertion, and shall be twelve cents a line, single column, standard newspaper measurement for each subsequent insertion. Publication of such notices may be in any type selected by the publisher, but as to fees for such publication the measurement shall be in eight point type.

Nevada

Nev. Stat. §238.070. Rates for official advertising of state and counties; annual contracts for county printing and advertising.

1. All advertising ordered or required by the State of Nevada or by the respective counties of the state shall be paid for by the state or the county ordering or requiring the same at the rate of not more than 30 cents per single column line 6-point type for the first insertion and not more than 20 cents per single column line for each subsequent insertion; an insertion to be held to be one publication per week whether the newspaper in which such advertising is ordered to be done be published daily or weekly.

New Jersey

N. J. Stat. §35:2-1. Rates for official advertising.

The price to be paid for publishing all official advertising as defined in section 35:1-1 of this Title in newspapers shall be as follows:

In newspapers published in the State of New Jersey having a bona fide net paid circulation of up to 2,500 copies, the rate shall be $0.16 per agate (or 5½ point) line for each insertion; in the case of any newspaper having a bona fide net paid circulation of not less than 2,500 copies nor more than 5,000 copies, the rate shall be $0.20 per agate line for each insertion; and in the case of any newspapers having a bona fide net paid circulation of not less than 5,000 copies and not more than 10,000 copies, the

rate shall be $0.22 per agate line per insertion; and in the case of any newspaper having a bona fide net paid circulation of not less than 10,000 copies and not more than 30,000 copies, the rate shall be $0.23 per agate line per insertion; and in the case of any newspaper having a bona fide net paid circulation of not less than 30,000 and not more than 50,000 copies, the rate shall be $0.24 per agate line per insertion; and in the case of any newspaper having a bona fide net paid circulation of not less than 50,000 copies and not more than 75,000 copies, the rate shall be $0.26 per agate line per insertion; and in the case of any newspapers having a bona fide net paid circulation of not less than 75,000 copies and not more than 100,000 copies, the rate shall be $0.32 per agate line per insertion; and in the case of any newspaper having a bona fide net paid circulation of not less than 100,000 copies and not more than 125,000 copies, the rate shall be $0.40 per agate line per insertion; and in the case of any newspapers having a bona fide net paid circulation of not less than 125,000 copies, and not more than 150,000 copies, the rate shall be $0.47 per agate line per insertion; and in the case of any newspapers having a bona fide net paid circulation in excess of 150,000 copies, the rate shall be $0.54 per agate line per insertion; but before any newspaper can charge the foregoing rates, the publisher or business manager of such newspaper must file with the properly authorized officer of every municipality, county or governing body, placing official advertising in such newspaper, an affidavit setting forth the average net paid circulation of such newspaper for the 12 months' period ending September 30 next preceding and the rate to be charged for official advertising, which in no case shall be in excess of, or below, the rates provided in the foregoing schedule.

The charge per agate or 5½ point line shall be based on measurement of a line of not less than 10 ems in width, but date lines, paragraph endings, titles, signatures and similar short lines or lines that require special emphasis, such as the title of the notice, shall be computed as full lines where set to conform to the usual rules of composition.

New Mexico

N. M. Stat. §10-2-7. Rates for legal notice or advertisement—Costs.—For the publication of all legal notices or advertisements required by law or the order of any court of record in this state to be published in newspapers, the publishers thereof shall be entitled to receive fifteen cents ($.15) for each column line of eight [8] point or smaller type, for the first insertion, and twelve cents ($.12) per line for each subsequent insertion. All emblems, display headings, rule work and necessary blank space shall be calculated as solid type, and shall be counted and paid for as such.

The clerk of any court in the state or any public trustee, county treasurer, or other public officer required by law to publish legal notices or advertisements shall tax the cost of publishing notices or advertisements, as prescribed in this section, as part of the costs of the cause or proceeding and shall collect for publication, before the cause or proceeding is closed, and shall remit to the publisher the proper cost of the legal notices or advertisements.

New York

N. Y. Stat. P.O. §70-a. Fees to be paid by public officers for public advertisements.— The charge for the publication of concurrent resolutions, proposed constitutional amendments, propositions or questions to be submitted to the voters of the state, tax sales and official notices required to be published by state boards, commissions or officers in newspapers of the state, shall be paid from the treasury on the audit and warrant of the comptroller, after certification by the proper officer that such a publication has been regularly made as prescribed by law. The charge for the publication, if authorized by law, of digests of laws of a local nature in the newspaper designated to publish such digests shall be paid by the several counties of the state in which such laws may be published, upon like certification. The charge for the publication of concurrent resolutions, proposed constitutional amendments, propositions or questions to be submitted to the voters of the state or of any political subdivision thereof or therein, tax sales by the state or any county or municipality therein, and of all official notices and advertisements authorized or required by law to be published at the expense of the state or of a county, city, town, village, public authority, public benefit corporation or other political or civil subdivision of the state, shall be at the rate of sixteen cents per line of a column width not less than ten pica ems, provided that in computing such charge per line the line shall average at least five words for each insertion in newspapers having less than two thousand five hundred circulation; seventeen and one-half cents per line for newspapers having two thousand five hundred or more circulation and less than five thousand; eighteen cents per line for newspapers having five thousand or more circula-

tion and less than seven thousand five hundred; seventeen cents per line for newspapers having seven thousand five hundred or more circulation and less than ten thousand; eighteen cents per line for newspapers having ten thousand or more circulation and less than fifteen thousand; and one and one-half cents per line in addition to the eighteen cents for the initial ten thousand circulation, for each additional five thousand circulation possessed by such newspapers. To all of the above rates eight cents per line shall be added to the initial insertion charge of each separate advertisement. To all of the above rates for the initial insertion eight cents per line shall also be added for tabular matter or intricate composition. Display advertising shall be charged agate measurement, fourteen lines to each inch, ten to thirteen pica ems wide, depending on the makeup of the newspaper publishing such copy. Every newspaper printed, published or having its principal office outside of a city having a population of over five hundred thousand inhabitants, as a condition precedent to designation as the official newspaper of any county, city, town, village or other political or civil subdivision of the state or for the making of claim for compensation under the foregoing provisions of this section, must be established at least one year and entered in the post office as second class matter.

North Carolina

N. C. Stat. §1-596. Charges for legal advertising.—The publication of all advertising required by law to be made in newspapers in this State shall be paid for at not to exceed the local commercial rate of the newspapers selected. Any public or municipal officer or board created by or existing under the laws of this State that is now

or may hereafter be authorized by law to enter into contracts for the publication of legal advertisements is hereby authorized to pay therefor prices not exceeding said rates.

No newspaper in this State shall accept or print any legal advertising until said newspaper shall have first filed with the clerk of the superior court of the county in which it is published a sworn statement of its current commercial rate for the several classes of advertising regularly carried by said publication, and any owner or manager of a newspaper violating the provisions of this section shall be guilty of a misdemeanor. (1919, c. 45, ss. 1, 2; C.S., s. 2586; 1945, c. 635; 1949, c. 205, s. 1-1½.)

North Dakota

N. D. Stat. 46-05-03. Legal notices — Fees.— The fees to be paid to newspapers for the publication of:

1. Any notice or publication required by law to be published by the board of county commissioners or any county officer;

2. Any summons, citation, notice, or other document, proceedings, or process in an action or proceedings in any court of the state, which is required by law to be published;

3. Any publication required to be published by any state officer, elected or appointive;

4. Any notice of foreclosure of a real estate mortgage, or a chattel mortgage or other lien foreclosed by advertisement;

5. Any notice or publication required to be published by any city, village, township, school district, or other political subdivision of the state, or by any officer thereof; and

6. Any legal notice and legal publication of whatever kind or character required by law to be published, shall be fourteen cents per counted line of nonpareil or six point type for the first insertion and nine cents per line of nonpareil or six point type for each subsequent insertion, or eleven cents per counted line of brevier or eight point type for the first insertion and seven cents per line of brevier or eight point type for each subsequent insertion. All tabulated matter, leader work, or work containing one column of figures shall be figured at one and one-half times the rate for straight matter on first publication, and all tabulated matter with two or more columns of figures shall be computed at double the rate for straight matter on first publication. A line shall be construed to mean not less than eleven or more than thirteen ems pica of twelve point type in length. Wherever possible, all such legal notices and publications shall be set in single column.

Ohio

Ohio Stat. §7.10. Rates for legal advertising; definition of square.

For the publication of advertisements, notices, and proclamations required to be published by a public officer of the state, county, municipal corporation, township, school, benevolent or other public institution, or by a trustee, assignee, executor, or administrator, or by or in any court of record, except when the rate is otherwise

fixed by law, publishers of newspapers may charge for the first insertion three dollars for each square, and for each additional insertion, authorized by law or by the person ordering the insertion, two dollars for each square.

Fractional squares shall be estimated at a like rate for space occupied. In advertisements containing tabular or rule work, fifty per cent may be charged in addition to the foregoing rates. Newspapers having a circulation of over fifteen thousand may charge and receive for such advertisements, notices, and proclamations rates charged on annual contracts by them for a like amount of space to other advertisers who advertise in its general display and advertising columns. The publisher shall make and file with his bill before its payment an affidavit that the newspaper had a bona fide circulation of more than fifteen thousand at the time the advertisement, notice, or proclamation was published, and that the price charged in the bill did not exceed the rates provided in this section for such advertisement, notice, or proclamation.

As used in this section, a square is a space occupied by two hundred forty ems of the type used in printing such advertisements. Legal advertising shall be set up in a compact form, without unnecessary spaces, blanks, or headlines, and printed in type not smaller than nonpareil. The type used must be of such proportions that the body of the capital letter M is no wider than it is high and all other letter and characters are in proportion.

Except as may be done under section 2701.09 of the Revised Code, all legal advertisements or notices shall be printed in newspapers published in the English language only.

Oklahoma

Okla. Stat. §121. Fees for printing legal notices.

In all cases where publication of legal notices is required or allowed by law, the person or official desiring such publication shall be required to pay:

For all matters other than tabular matter, four cents (4c) per word for first insertion, and three cents (3c) per word for each subsequent insertion, with each separate group of numerals included in such matter to be counted as one (1) word, regardless of the number of digits involved;

For all tabular matter, in not to exceed eight (8) point type, including but not limited to lists of persons, firms and corporations whose personal property taxes are delinquent and lists of lands and town lots upon which taxes are delinquent, twenty-five cents (25c) per line per newspaper column in width, for first insertion, and twenty cents (20c) per line per newspaper column in width, for each subsequent insertion.

The county treasurer shall collect the cost of publication of lists of lands and town lots sold for delinquent taxes at original sale or resale from the individuals purchasing such lands and town lots at the sale or resale involved, and shall deposit all moneys so collected to the credit of the general fund of the county, and the publisher of the notice involved shall be paid for the publication of any such notice, from the general fund of the county, or, to the extend that proper appropriation be not available therefor at

the time of publication, from the "Resale-Property Fund" of the county.

Oregon

Ore. Stat. §193.090. Compensation for publication.

(1) When published in a newspaper having more than 40,000 proved circulation, as shown by the last annual report made to the United States Government, the compensation for the publication of all notices, summonses, citations, all notices of sheriffs' sales and other legal advertisements which are now or hereafter required by law to be published shall be not more than five cents per column inch per insertion, for each 1,000 of proved circulation.

(2) When published in any newspaper other than one described by subsection (1) of this section, compensation shall be as follows:

(a) The rate for county financial statements, reports and proceedings mentioned in ORS 193.030, 294.230, 294.235 and 294.250, foreclosure for delinquent taxes as provided in ORS 312.040, 312.190 and 312.400, summary of the budget documents mentioned in ORS 294.416, and all publications required by law to be made in the county official paper or papers shall be 20 cents per column line of 8-point type for the first insertion and 15 cents per column line of 8-point type for each subsequent insertion. If a different point type is used the total charge for such publication shall be the same as if 8-point type were used.

(b) The rate for all notices, summonses, citations and all other legal advertisements now or hereafter required by law or order of court, and not specifically set out in paragraph (a) of this subsection, shall be 20 cents per column line of 8-point type for the first insertion and 15 cents per column line of 8-point type for each subsequent insertion. If a different point type is used the total charge for such publication shall be the same as if 8-point type were used.

[Amended by 1963 c. 576, §36; 1963 c. 623, §1; 1971 c. 295, §1]

Pennsylvania

Pa. Stat. Ch. 1, T.45, §8. Publishers to fix and furnish rates; not to change rates without notice.

All newspapers of general circulation, official newspapers, legal newspapers, and legal periodicals, accepting and publishing official and legal advertising, are hereby required to fix and establish rates and charges for official, legal and all other kinds of advertising, offered or accepted for publication, and such newspapers and periodicals shall furnish, on demand, to any person or persons having use for the same, detailed schedules, stating the rates and charges which shall be deemed to be in force and effect until changed or altered, and, when changed or altered, such newspaper or periodical shall give the person, persons, corporation, association, municipality or municipalities, or public officers, authorized or required to publish

advertising, before demanding or receiving compensation at any increased rate, notice that the rates and charges of such newspaper or periodical or advertising have been changed or abrogated, and that increased advertising rates and charges have been established or fixed. 1929, May 16, P.L. 1784, §8.

South Carolina

S. C. Stat. Ch. 15, §10-1308. Charges for legal advertisements in newspapers.—State and county officials authorized by law to publish advertisements in the newspapers of this State, including advertisements of sales of real and personal property by masters, clerks of court, judges of probate and sheriffs, citations, notices to creditors, notices of final settlement by executors, administrators, guardians and all other persons acting in a fiduciary capacity, service of summons by publication, notices of election ordered by commissioners, reports of county treasurers, supervisors and superintendents of education, notices of county auditors, proclamations of the executive department, proposals for works and supplies by the heads of departments or other officials authorized to advertise for competitive bids and all other advertising whatever done by order of court or by State and county officials, shall be charged not exceeding one dollar per inch for the first insertion and not exceeding fifty cents per inch for each subsequent insertion for advertisements which, when the newspaper uses such type, shall be set in solid brevier type, including the caption and all other parts of the advertisement. Newspapers that do not use brevier type shall receive compensation based on brevier measure.

When the value of the real estate as to which any such advertisement is made is less than two hundred dollars only one half of the rate hereinbefore allowed shall be charged or allowed and when the value of such real estate is less than one hundred dollars only one fourth of the rate hereinbefore allowed shall be charged or allowed. The charge for printing the reports of the county treasurers and supervisors shall not exceed sixty dollars each per annum.

The publication of any of the notices herein mentioned may be let by contract for not more than the prices herein mentioned. (1952 Code §10-1308; 1942 Code §8894; 1932 Code §8894; Civ. C. '22, §5707; Civ. C. '12 §4195; Civ. C. '02 §3091; 1899 (22) 47; 1902 (23) 1074; 1905 (24) 847; 1915 (29) 72; 1919 (31) 45; 1921 (32) 160.)

South Dakota

S. D. Stat. §17-2-19. Fees chargeable for first legal publication—Tabular matter.—In all cases where any legal publication of anything is required or allowed by law, and no other fee is prescribed for such publication, the maximum fee which may be charged for said publication shall, except as provided by §17-2-21, be as follows:

* * *

Where column widths or type used is other than those shows above, the rate per line of type should be proportionately increased or decreased. (Formula: Length of line times 12 points; divide by size of type used to get ems; number of ems times .0053 cents for line charge.)

Tabular matter with one justification shall be charged for at rate and one-half; and tabular matter with two justifications or more at double the above rates.

Texas

Tex. Stat. T.1, Art. 29. Legal rate of publication. Wherever any publication, as publication is defined in Section 1 hereof, is authorized or required by any law, general or special, to be inserted in a newspaper, the legal rate which such newspaper shall charge for such publication shall be the lowest published rate of that newspaper for classified advertising.

All bills for publication shall be accompanied by a certificate of the publisher, under oath, certifying the number of publications and the dates thereof, together with the clipping of said publication from an issue of said newspaper, the rate charged, and certification that it is the lowest published classified rate. The Board of Control, or any district or county official charged with the publication of any notice required by law to be published, is hereby fully authorized and empowered to cancel any contract made by them, or either of them, in the event said Board or official may ascertain or determine that a higher rate is being charged by said newspaper than provided herein. All political advertising, except display advertising, shall be done at the same rate as legal notices, and under the same supervision and regulations. Political advertising shall include the announcements for public office.

This Act shall apply to all publications required by law, and it is specially provided that this Act shall apply to all citations or notices which are required to be pub-

lished or may be published in delinquent tax suits and to notices of sale of real estate under execution, order of sale, or any other judicial sale provided for in Articles 3808, 4203, 7276, and 7342 of the Revised Civil Statutes of Texas, 1925.

Virginia

Va. Stat. §8-81. Newspapers which may be used for legal notices and publications. — Whenever there are required by law to be published by any county, city or other municipality or municipal corporation, or by any municipal board or official board, or body, or office, or officials, or by any person or corporation, any ordinances, resolutions, or notices or advertisements of any sort, kind or character by printing and publishing the same in a newspaper, such newspaper must in addition to any qualifications otherwise required by law meet the following qualifications, namely: such newspaper shall be entirely printed in the English language, shall have been entered as second class mail matter under the postal laws and regulations of the United States and shall have a list of bona fide subscribers voluntarily engaged as such, who have paid or have agreed to pay a stated price for a subscription for a definite period of time. (1940, p. 163; Michie Code 1942, §6073b.)

Washington

Wash. Stat. §65.16.090. Publication fees. — Where publication of legal notices is required or allowed by law, the person or officer desiring the publication shall pay on a basis of two dollars and forty cents per folio of one hundred words for the first insertion and one dollar and

eighty cents per folio of one hundred words for each subsequent insertion, or its equivalent in number of words: Provided, That a newspaper having a circulation of over twenty thousand copies each issue may charge such additional rate as it deems necessary and just and any person or officer authorizing the publication of a legal notice in such newspaper may legally pay such rate as is charged by it: Provided further, That this section shall not apply to the amount to be charged for the publication of a legal notice or advertisement for a school district, city, town, county, state, municipal, or quasi municipal corporation or the United States government.

Wash. Stat. §65.16.095. Rates for political candidates.—The rate charged by a newspaper for advertising in relation to candidates for political office shall not exceed the national advertising rate extended to all general advertisers and advertising agencies in its published rate card.

West Virginia

W. Va. Stat. §59-1-34. Charges for publication; general provisions relating to publication.

The price for publishing all advertisements and publications required to be made by law, or by the order of a court in any cause or proceeding therein, or by any provision of a deed of trust, or where any publication is made pursuant to law, shall not exceed two and three fourths cents for each word for the first insertion, and one and one half cents a word for each subsequent insertion required to be made: Provided, that for a notice to take depositions, notice to creditors, notice of receiving bids on public contracts, notice of the dissolution of a corporation,

and an order of publication, published less than four insertions, the rate shall be not more than seven and one half cents for each word for whatever number of insertions, less than four, that may be required to be made.

Notwithstanding the above paragraph, however, in those cases where a statute specifically provides for a different charge for publication (as in section two [§11A-3-2], article three, chapter eleven-A of this Code as amended), the price for publishing such advertisements or other publications shall be forty cents per item for each insertion in each newspaper.

In computing the number of words in a legal advertisement, not set solid, the basis shall be upon the size of type in which legal advertising is usually set by the newspaper making the publication, and shall be computed at the legal rate as though the matter was solid type, that is to say, on the basis of eighty-four words to the column inch in six point type, and fifty-four words to the column inch in eight point type, and any other size type in proportion.

If no newspaper in the county in which such publication should be made will insert the same for the times required, or for the price aforesaid, then the notice or advertisement may be published in a newspaper of general circulation in such county published in another county. If the publication is to be made in any case or proceeding in court, the court shall designate the newspaper in such other county and if the publication is not to be made in a case or proceeding in court, the court shall designate the newspaper in such other county and if the publication is not to be made in a case or proceeding in court, the

newspaper shall be selected by the person at whose instance it is to be made, or his agent; and when the notice published is an advertisement of a sale of property, the notice shall be posted, by the person or persons whose duty it is to place the advertisement for publication, at the front door of the courthouse of the county in which the sale is to be made at least three weeks prior to the time fixed for making the sale, and copies of such notice shall be posted in at least four other public places in such county at the same time.

In case of any publication made by the order of a court, in any case or proceeding therein, or by any provision of a deed of trust, the price paid shall be taxed in the bill of costs, and the newspaper making any such publications herein last mentioned, and in all other cases wherein legal publications are made as herein provided if required by the party or parties placing such advertisement, shall make and furnish, under oath, a certificate of publication of each advertisement so published, showing the number of times it was inserted in such newspaper, the dates of the first and last insertions thereof, and the amount of costs for such publication, as required by this section. Any posting of any such advertisement at the front door of the courthouse, when so required, shall be done by the publisher of the newspaper in which the publication was published, and in such cases the certificate of publication herein provided for shall state that the advertisement was posted at the front door of the courthouse. In cases where any such notices are not published by a newspaper, the certificates and affidavits herein provided for shall be made by the party who would place the advertising with the newspaper had it been published by such newspaper.

All advertisements required to be made by the State of West Virginia, or any county, district, school district, city, town or village, or any political subdivision thereof or levying body, shall be published in a daily, tri-weekly, semi-weekly, or weekly newspaper or newspapers, as the case may be, of general circulation in the county wherein the publication is to be made, and representing one or both of the two major political parties in such county, and which shall have been published continuously at least once a week for a period of one year at the time of placing such legal advertising, and at a plant located in this State and capable of printing and publishing a weekly newspaper of general circulation and owned by the owner of such newspaper, except and unless there be no newspaper in that county affiliated with one of two political parties: Provided, that where any such newspaper succeeds to the field of a former established newspaper, it shall be eligible to publish such legal advertising from its inception.

Any citizen, taxpayer, or the owner or publisher of any newspaper entitled by law to have any publication made in his newspaper, which any county court or tribunal created in lieu thereof, board of education, council of a municipal corporation, or public officer, shall fail or refuse to make, may have a writ of mandamus to compel the making of such publication: Provided, that the newspaper is willing to accept the price prescribed therefor by law.

In no case involving the publication of paid advertisements for candidates for political office shall the rate charged by any publisher be more than the average rate received by him from private patrons for similar advertising composed of reading matter or photographs and requiring the same amount of space.

Wisconsin

Wis. State. §331.25. Fees for publishing.—(1) The fees for publishing a legal notice shall be not more than $1.25 per folio for the first insertion, and 90 cents per folio for each insertion after the first. The newspaper may increase such rates up to 10 per cent for each 4,000 of circulation or fraction thereof above 8,000 of circulation, based on previous year-end circulation figures, not to exceed, however, an additional increase of 50 percent. Where compensation is required to be based upon the square, the fees per square shall be the same as the fees per folio herein provided.

(2) Provided that in all newspapers published in counties containing more than two hundred thousand population the fees for the publication of a legal notice may be equal to, but not in excess of, the regular publishing rate actually required from time to time of private advertisers for similar advertising matter.

(3) No fee shall be paid and no public funds shall be used for subsidizing any privately owned medium of distribution, or for payment for any public advertising or notice in any privately owned medium of distribution which has not previously qualified as a public newspaper for a period of 2 years as defined in this chapter.

TABLE V

STATUTES FORBIDDING PUBLICATION OF INFORMATION DEALING WITH LOTTERIES

California

Cal. Stat. Crim. § 323. Lottery offices: (Keeping or) advertising lottery offices.—Every person who opens, sets up, or keeps, by himself or by any other person, any office or other place for the sale of, or for registering the number of any ticket in any lottery, or who, by printing, writing, or otherwise, advertises or publishes the setting up, opening, or using of any such office, is guilty of a misdemeanor.

Colorado

Colo. Stat. 40-16-4. Newspapers advertising lottery —penalty.—It shall be unlawful for any person, association or corporation, being the owner of any newspaper published in this state, to publish in any such newspaper any advertisement of any lottery, game or device of chance, whether the drawing be to take place in this state or not. Whovere violates this provision, upon conviction, shall be fined not less than one thousand dollars. Source: L. 81, p. 179, § 4; G. S. §2199; R. S. 08, § 4115; C. L. § 3762; CSA, C. 104, § 4; CRS 53, § 40-16-4.

Florida

Fla. Stat. 849.09. Lottery prohibited.—1. It shall be unlawful for any person in this state to:

(c) Conduct any lottery drawing for the distribution of a prize or prizes by lot or chance, or advertise any such lottery scheme or device in any newspaper or by circulars, posters, pamphlets, radio, telegraph, telephone, or otherwise; or

(d) Aid or assist in the setting up, promoting or conducting of any lottery or lottery drawing, whether by writing, printing or in any other manner whatsoever, or be interested in or connected in any way with any lottery or lottery drawing.

Indiana

Ind. Stat. 10-2303 (2681). Lottery—Advertising.—Whoever writes, prints, advertises or publishes in any way an account of any lottery, gift enterprise or scheme of chance of any kind or description, by whatever name, style or title the same may be denominated or known, stating when or where the same is to be drawn, what the prizes therein or any of them are, or the price of a ticket, or showing therein where any ticket may be obtained, or in any way giving publicity to such lottery, gift enterprise or scheme of chance, shall, on conviction, be fined not less than ten dollars ($10.00) nor more than five hundred dollars ($500.00). (Acts 1905, ch. 169, § 556. p. 584.)

Iowa

Iowa Stat. 726.8 Lottery and lottery tickets.—If any person make or aid in making or establishing, or advertise or make public any scheme for any lottery; or advertise, offer for sale, sell, negotiate, dispose of, purchase,

or receive any ticket or part of a ticket in any lottery or number thereof; or have in his possession any ticket, part of a ticket, or paper purporting to be the number of any ticket of any lottery, with intent to sell or dispose of the same on his own account or as the agent of another, he shall be imprisoned in the county jail not more than thirty days, or be fined not exceeding one hundred dollars, or both. Constitutional Provisions. Art. 3, § 28 provides that no lottery shall be authorized by this state, nor the sale of lottery tickets allowed.

Maryland

Md. Stat. Art. 27, § 363. Publication of account of lottery.—If any person shall be printing, writing, or in any other way publish an account of any lottery, stating when or where the same is to be drawn, or the prizes therein, or any of them, or the price of a ticket or a share therein, or where any ticket may be obtained therein, or in any way aiding or assisting in the same, he shall on conviction be subject to a fine of one hundred dollars, or to imprisonment for the term of sixty days, at the discretion of the court.

Michigan

Mich. Stat. 750.375. Same; advertising, printing, publishing tickets.—Sec. 375. Advertising, printing, etc., lottery tickets or gift enterprises—Any person who shall advertise, print or publish any lottery ticket or gift enterprise, or any share in any such ticket, for sale either by himself or by another person, or who shall set up or exhibit, or shall devise and make for the purpose of being set up and exhibited, any sign, symbol or any emblematic or other

representation of a lottery or gift enterprise, or of the drawing thereof, in any way indicating where a lottery ticket or a share thereof, or any such writing, certificate, bill, goods, merchandise or chattels, token or other device, before mentioned, may be purchased or obtained, or shall in any way invite or entice, or attempt to entice, any other person to purchase or receive the same, he shall be guilty of a misdemeanor.

Mississippi

Miss. Stat. § 2274. Lotteries—newspapers.—If any newspaper published or circulated in this state shall contain an advertisement of any lottery whatever, or any matter intended to advertise a lottery, no matter where located, the editor or editors, publisher or publishers, and the owner or owners thereof permitting the same, shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than one hundred dollars nor more than one thousand dollars, and be imprisoned in the county jail not less than ten days nor more than three months, for each offense; and the issuance of each separate daily or weekly edition of the newspaper that shall contain such an advertisement shall be considered a separate offense. Sources: Codes, 1892, § 1203; 1906, § 1281; Hemingway's 1917, § 1013; 1930, § 1042.

Missouri

Mo. Stat. 563.440. Advertising or selling lottery tickets.—Any person who shall sell or expose to sale, or shall keep on hand for the purpose of sale, or shall adver-

tise or cause to be advertised for sale, or who shall advertise or cause to be advertised for sale, or who shall print or publish an advertisement, or shall aid or assist, or be in anywise concerned in the sale or exposure to sale of any lottery ticket or tickets, or any share or part of any lottery ticket in any lottery, or device in the nature of a lottery within this state or elsewhere and shall be convicted thereof in any court of competent jurisdiction, shall, for each and every offense, forfeit and pay a sum not exceeding one thousand dollars. As amended Laws 1963, p. 684, § 1.

Nebraska

Neb. Stat. 28-963. Advertising lottery; penalty.— If any person shall be printing, writing, or in any other way, publish an account of any lottery or scheme of chance, as defined in section 28-963.01, of any kind or description, to be carried on, held or drawn, either out of or within the State of Nebraska, by whatever name, style or title the same may be denominated or known, stating when or where the same is to be drawn, or the prizes therein or any of them, or any information in relation to such prizes or any of them, or the price of a ticket, show or chance therein, or where any ticket may be obtained, or in any way aiding or assisting in the same, or in any way giving publicity to such lottery or scheme of chance, shall be subjected to a fine not exceeding five hundred dollars.

North Carolina

N. C. Stat. § 14-289. Advertising lotteries. — If anyone, by writing or printing or by circular or letter or in any other way, advertise or publish an account of a

lottery, whether within or without this State, stating how, when or where the same is to be or has been drawn, or what are the prizes therein or any of them, or the price of a ticket or any share or interest therein, or where or how it may be obtained, he shall be guilty of a misdemeanor. (1887, c. 211; Rev., s. 3725; C. S., s. 4427.)

North Dakota

N. D. Stat. 12-24-06. Advertising lotteries—Misdemeanor.— Each person who, by writing or printing, by circulars or letters, or in any other way, advertises or publishes any:

1. Account of any lottery, stating when or where the same is to be or has been drawn, or what are the prices, or any of them therein, or the price of a ticket, or of any share or interest, or where it may be obtained, or in any way aiding or assisting the same, or which is adapted to inducing persons to adventure therein;

2. Account of the opening, setting up, or keeping of any office or other place for either of the purposes prohibited by section 12-24-05; or

3. Offer, notice or proposal for insuring or receiving consideration for insuring the drawing of tickets, shares, or interest in any lottery,

is guilty of a misdemeanor. The provisions of sub-sections 1 and 2 are applicable wherever the advertisement was published, or the letter or circular sent or delivered through or in this state, notwithstanding that the person causing or procuring the same to be published, sent, or delivered, was out of this state at the time of so doing.

Oklahoma

Okla. Stat. 21 § 1056. Advertising lotteries.— Every person who, by writing or printing, by circulars or letters, or in any other way advertises or publishes any account of any lottery stating when or where the same is to be or has been drawn, or what are the prizes or any of them therein, or the price of a ticket or of any share or interest or where it may be obtained, or in any way aiding or assisting the same, or adapted to induce persons to adventure therein, is guilty of a misdemeanor. R.L. 1910, § 2475.

South Carolina

S. C. Stat. Art. 17, §7. Lotteries.—No lottery shall ever be allowed, or be advertised by newspapers, or otherwise, or its tickets be sold in this State; and the General Assembly shall provide by law at its next session for the enforcement of this provision.

Utah

Utah Stat. 76-27-13. Maintaining office for sale.— Every person who opens, sets up or keeps, by himself or by any other person, any office or other place for the sale of, or for registering the number of, any tickets in any lottery, or who, by printing, writing or otherwise, advertises or publishes the setting up, opening or using of any such office, is guilty of a misdemeanor.

Vermont

Vt. Stat. T. 13 § 2103. Lottery tickets.—(a) A person shall not:

(4) Set up, exhibit or publish or cause to be set up, exhibited or published within this state written or printed proposals to buy, sell or procure such ticket or interest therein.

Washington

Wash. Stat. 9.59.020. Selling tickets, advertising.—Every person who shall sell, give, or in any way whatever furnish or transfer to or for another, a ticket, chance, share or interest, or any paper, certificate or instrument purporting to be or to represent a ticket, chance share or interest in, or dependent upon the event of, a lottery, to be drawn within or without the state; or who by writing, printing, circular or letter, or in any other way shall advertise or publish the account of a lottery in or out of the state, stating how, when or where the same is to be or has been drawn, or what are the prizes therein, or any of them, or the price of a ticket, or any share or interest therein, or where or how it may be obtained, shall be guilty of a gross misdemeanor.

TABLE VI

STATUTORY RESTRICTIONS ON MEDIA ELECTIONEERING IN VICINITY OF POLLING PLACES

Arizona

Ariz. Stat. §16-862. "Fifty-foot limit" notices; posting; penalty for violation.

(A) The board of supervisors shall furnish with the ballots for each polling place, three notices, printed on

muslin in letters not less than two inches high, reading; "Fifty-foot limit" and underneath that heading the following:

"No person shall be allowed to remain inside these limits while the polls are open, except for the purpose of voting, and except the election officials and not more than one representative of each political organization represented on the ballot, such representative to be one of three appointed by the chairman of the local committee of such political organization. Voters having cast their ballots shall at once retire without the fifty-foot limit. A person violating any provision of this notice is guilty of a misdemeanor."

(B) Before opening the polls, the election marshal shall post three fifty-foot limit notices approximately fifty feet, in different directions, from the entrance of the place in which the election is being held.

(C) Any person violating any provision of the fifty-foot limit notice is guilty of a misdemeanor.

Arkanasas

Ark. Stat. §3-1415. Electioneering by election officer —Electioneering near polls—Intimidation or bribery of voters—Penalty.— No officer of election shall do any electioneering on election day. No person whomsoever shall do any electioneering in any polling room, or within one hundred [100] feet of any polling room on election day. No person shall, at or before any election, directly or indirectly, hire or bribe any elector to vote for or against the nominee of any political party, or for or against any particular question or candidate, by any threat or warning

of personal violence or injury, or by any threat or warning of ejectment from rented or leased premises, or by the foreclosure of any mortgage or deed of trust, or of any action at law or equity, or of discharge from employment, or of expjulsion from membership in any church, lodge, secret order or benevolent society, or by any oath or affirmation or secret written pledge. Nor shall any elector take or receive any money or other valuable thing, or the promise of any money or other valuable thing, in consideration that he shall or will vote for or against any candidate for office, or for or against any candidate or question, or shall promise to vote for or against any such candidate or question. Any violation of this act shall be deemed a felony, and on conviction, shall be punished by imprisonment in the penitentiary not less than one [1] year nor more than three [3] years. [Act Mar. 4, 1891, No. 30, §39, p. 32; C. & M. Dig., §3809; Pope's Dig., §4779.]

California

Cal. Stat., Art. 1, §14212. Electioneering.—No person, including an election officer, shall do any electioneering on election day within 100 feet of any polling place.

Florida

Fla. Stat. §104.36. Distribution of literature, etc., near polling places.—On the day of any election it shall be unlawful for any person to distribute any political pamphlets, cards or literature of any kind, or solicit votes, or approach any elector in an attempt to solicit votes within 100 yards of any polling place. All peace officers or election officials shall arrest any person violating the provi-

sions of this section in their presence. Any person violating the provisions of this section shall be, upon conviction, guilty of a misdemeanor.

Idaho

Idaho Stat. §18-2318. Electioneering at polls.— No officer of election shall do any electioneering on election day. No person shall do any electioneering on election day within any polling place, or any building in which an election is being held, or within one hundred feet thereof, nor obstruct the door or entries thereto, or prevent free ingress to, and egress from, said building. Any election officer, sheriff, constable or other peace officer is hereby authorized, and it is hereby made the duty of any such officer, to arrest any person violating any of the provisions of this section, and such offender shall be punished by a fine not exceeding $100.00, or less than twenty-five dollars. [1890-1891, p. 50, §4; reen. 1899, p. 27, §4; reen. R.C. & C.L., §6371; C.S., §8112; I.C.A., §17.417.]

Indiana

Ind. Stat. §29-5940. Electioneering—Disclosing vote. —No officer of election shall disclose to any person the name of any candidate for whom any voter has voted. No officer of election shall do any electioneering on election day. No person whatever shall do any electioneering on election day. No person whatever shall do any electioneering on election day within any polling-place, or within fifty [50] feet of any polling-place. No person shall apply for or receive any ballot in any polling-place other than in which he is entitled to vote. No person shall show his ballot after it is marked to any person in such a way as to reveal the

contents thereof or the name of any candidate or candidates for whom he has marked his vote; nor shall any person examine a ballot which any elector has prepared for voting or solicit the elector to show the same. No person except the inspector of election, or a member of the board who may be temporarily acting for him, shall receive from any voter a ballot prepared by him for voting. No voter shall receive a ballot from any person other than one of the clerks; nor shall any person other than a clerk deliver a ballot to a voter to be voted. No voter shall deliver any ballot to an inspector except the one he receives from the clerk. No voter shall place any mark upon his ballot, or suffer or permit any other person to do so, by which it may be afterward identified as the one voted by him. Whoever shall violate any provision of this section shall be deemed guilty of a felony. [Acts 1945, ch. 208, §426, p. 680.]

Iowa

Iowa Stat. T.4, §49.107. Prohibited acts on election day.—The following acts, except as specially authorized by law, are prohibited on any election day:

1. Loitering, congregating, electioneering, treating voters, or soliciting votes, during the receiving of the ballots, within one hundred feet of any outside door of any building affording access to any room where the polls are held, or of any outside door of any building affording access to any hallway, corridor, stairway, or other means of reaching the room where the polls are held.

Kentucky

Ky. Stat. §118.330 [1467; 1470; 1472; 1569] Persons to keep away from polls; electioneering at polls prohibited.

(1) No person, other than the election officers and challengers, shall be permitted within the voting room while the vote is being polled, except for the purpose of voting or except by authority of the election officers to keep order and enforce the law. No person, other than the election officers and challengers, shall remain within fifty feet of the polls, except when voting.

(2) No officer of election shall do any electioneering on election day.

(3) No person shall do any electioneering on election day within any polling place or within fifty feet thereof.

(4) No voter shall be permitted to converse with others while in the voting room concerning their support or nonsupport of any candidate, party or issue to be voted on, except as provided in KRS 118.300.

Louisiana

La. Stat. §1534. Acts prohibited on election day; electioneering; exceptions; enforcement; penalty.

A. It shall be unlawful, except as otherwise provided herein, for any person, between the hours of 6:00 o'clock a.m. and 9:00 o'clock p.m., on the day on which is being held any primary, general or special election, to perform, or cause to be performed, any of the follwing acts within

a radius of three hundred feet of any polling place being used in such election:

(1) To solicit in any manner, or by any means whatsoever, any other person to vote for or against any candidate or proposition being voted for in such election; or

(2) To loiter within the above described area of any such polling place; or

(3) To hand out campaign cards, pictures, or other campaign literature, of any kind or description whatsoever; or

(4) To place or display political signs, pictures or other form of political advertising.

Maine

Me. Stat. Ch. 23, §892. Political activities.—On election day certain activity is prohibited in or near the voting place.

1. Instruction limited. Within the voting place, a person shall not instruct another in the method of marking his ballot, except as provided in section 862.

2. Influence prohibited. Within the voting place, a person shall not influence or attempt to influence another as to his choice of candidates.

a. Limitation. This does not prohibit a candidate from attendance at the voting place and oral communication with voters as long as he does not attempt to influence their vote.

3. Advertising prohibited. A person shall not display any advertising material or operate any advertising medium intended to influence the opinion of any voter, within 250 feet of the entrance to the voting place.

Minnesota

Minn. Stat. §211.15. Soliciting near polling places prohibited.

It shall be unlawful for any person within 100 feet of the building in which any polling place is situated on the day of any primary or election to ask, solicit, or in any manner try to induce or persuade any voter on such primary or election day to vote for or refrain from voting for any candidate or the candidates of any political party or organization, or any measure submitted to the people; and, upon conviction thereof, he shall be punished by a fine of not less than $5 nor more than $100 for the first offense, and for the second and each subsequent offense occurring on the same or different election days, he shall be punished by a fine as aforesaid or by imprisonment in the county jail for not less than five nor more than 30 days or by both such fine and imprisonment.

Any person who shall at any place on the day of any primary or election circulate or distribute, or cause to be circulated or distributed, any campaign cards, candidates' cards, placard or campaign literature of any kind whatsoever shall be guilty of a misdemeanor. Nothing herein contained shall be construed as modifying or repealing the provisions of section 210.05. Laws 1959, c. 675, art. XII, §15.

Missouri

Mo. Stat. §76.160. Election regulations.

1. No person or persons shall electioneer or solicit votes for any elective officer within one hundred feet of any polling place on election days.

* * *

Nevada

Nev. Stat. §293.592. Soliciting votes; electioneering. —It is unlawful within 100 feet of the entrance from the public thoroughfare to any polling place, marked as such entrance:

1. For any person to solicit a vote or speak to a voter on the subject of marking his ballot.

2. For any person, including an election board officer, to do any electioneering on election day.

New Hampshire

N. H. Stat. §59:125. Distribution of Cards, etc.— No person as candidate for office or representing or working for a candidate shall, within the building where an election is being held, distribute or post any cards or other printed or written matter. Whoever violates any of the provisions of this section shall be fined not more than one hundred dollars.

New Mexico

N. M. Stat. §3-20-14. Electioneering too close to the polling place.—Electioneering too close to the polling place

consists of any form of campaigning on election day within one hundred [100] feet of the building in which the polling place is located, and includes the display of signs or distribution of campaign literature.

Whoever commits electioneering too close to the polling place is guilty of a petty misdemeanor.

New York

N. Y. Stat. Art. 8, §193(2). General provisions as to conduct of elections.—While the polls are open no person shall do any electioneering within the polling place, or within one hundred feet therefrom in any public street, or within such distance in any place in a public manner; and no political banner, poster or placard shall be allowed in or upon the polling place or within one hundred feet therefrom during the election.

North Carolina

N. C. Stat. §163-147. No loitering or electioneering at voting place.—No person or group of persons shall, while the polls are open at the voting place on the day of the primary or election, loiter about, congregate, distribute campaign material, or do any electioneering within the voting place, or within 50 feet in any direction of the entrance or entrances to the building in which the voting place is located. Notwithstanding the above provision, if the voting place is located in a large building, the registrar and judges of the precinct may designate the entrance to the voting place within said building and none of the above activity shall be permitted within 50 feet of said entrance or entrances of said voting place. This section shall not, however, prohibit any candidate for nomination or election

from visiting such voting place in person, provided he does not enter the voting enclosure except to cast his vote as a registered voter in said precinct. The county boards of elections and precinct registrars shall have full authority to enforce the provisions of this section. (1929, c. 164, s. 19; 1967, c. 775, s. 1; 1971, c. 537.)

North Dakota

N. D. Stat. §16-20-19. Electioneering on election day —Penalty.—Any person asking, soliciting, or in any manner trying to induce or persuade, any voter on an election day to vote or refrain from voting for any candidate or the candidates or ticket of any political party or organization, or any measure submitted to the people, shall be punished by a fine of not less than five dollars nor more than one hundred dollars for the first offense. For the second and each subsequent offense occurring on the same or different election days, he shall be punished by a fine as provided in this section, or by imprisonment in the county jail for not less than five days nor more than thirty days, or by both such fine and imprisonment. The display upon motor vehicles of adhesive signs which are not readily removable and which promote the candidacy of any individual, any political party, or a vote upon any measure and political advertisements promoting the candidacy of any individual, political party, or a vote upon any measure, which are displayed on fixed permanent billboards, shall not, however, be deemed a violation of this section.

South Carolina

S. C. Stat. §23-658.2. When and where unlawful to distribute campaign literature.—It shall be unlawful on

any election day within two hundred feet of the building wherein a polling place is located for any person to distribute any type of campaign literature or place any political posters. The poll manager shall use every reasonable means to keep the area within two hundred feet of the polling place clear of political literature and displays, and the county and municipal law-enforcement officers shall, upon request of a poll manager, remove or cause to be removed any material within two hundred feet of a polling place distributed or displayed in violation of this section.

South Dakota

S. D. Stat. §12-18-3. Electioneering by officer of election or at polling place prohibited—Obstruction of polling place prevented by officers—Violation as misdemeanor —Penalty.—No officer of election shall do any electioneering on election day.

No person whatsoever shall do any electioneering on election day within any polling place or any building in which an election is being held or within fifty feet thereof, nor obstruct the doors or entries thereto or prevent free ingress to and egress from said building.

Any election officer, sheriff, constable, or other peace officer is hereby authorized and empowered and it is hereby made his duty to clear the passageways and prevent such obstruction, and to arrest any person so doing.

Whoever shall violate any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding two

hundred dollars and adjudged to pay the costs of prosecution, and shall stand committed to the county jail until such fine and costs are paid, not exceeding sixty days.

Texas

Tex. Stat. Ch. 7, Art. 259.231. Electioneering near polls.—Whoever shall do any electioneering or loitering within one hundred feet of the entrance of the place where the election is to be held, or who shall hire any vehicle for the purpose of conveying voters to the polling place, or shall wilfully remove any ballots from the polling place, except as permitted by law, shall be fined not exceeding five hundred dollars. Sec. 159, p. 559, Acts 1905.

Virginia

Va. Stat. §24.1-101. No loitering near polls; notice of prohibited area.—During the receiving and counting of the ballots, it shall be unlawful for any person to loiter or congregate within forty feet of any entrance of any polling place; in any manner to hinder or delay a qualified voter in reaching or leaving a polling place; within such distance to give, tender, or exhibit any ballot, ticket or other campaign material to any person or to solicit or in any manner attempt to influence any person in casting his vote.

The officers of election shall, prior to the opening of the polls, determine the area designated, delineate the boundaries of such prohibited area, and post sufficient notices which set forth the words "Prohibited Area" in two-inch type and also set forth the provisions of this section and §24.1-267 in not less than twenty-four point type.

The officers of election shall post the notices on the prohibited boundary to be visible to the voter and the public. (Code 1950 [Repl. Vol. 1969], §§24-186, 24-188; 1970, c. 462; 1971, Ex. Sess., c. 119.)

Washington

Wash. Stat. §29.51.020. Electioneering within the polls forbidden—Prohibited practices as to ballots—Penalty.—No person shall do any electioneering, or circulate cards or handbills of any kind, or solicit signatures to any kind of petition on primary or election day within any polling place, or any building in which an election is being held, or within one hundred feet thereof, nor obstruct the doors or entries thereto, or prevent free ingress to and egress from said building. Any election officer, sheriff, constable, or other peace officer shall have power to and shall clear the passageway and prevent such obstruction, and arrest any person creating such obstruction.

No person shall remove any ballot from the polling place before the closing of the polls; nor shall any person solicit the elector to show his ballot; nor shall any person except a judge of election receive from any elector a ballot prepared for voting; nor shall any person other than such inspector or judges of election deliver a ballot to such elector. Whoever violates any provision of this section shall be guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding one hundred dollars, and adjudged to pay the costs of prosecution.

West Virginia

W. Va. Stat. §3-9-6. Unauthorized presence in election room; sixty-foot limit; penalties.—If any person, not herein authorized so to do, shall enter or attempt to enter the election room, except upon a lawful errand and for a proper purpose, or shall remain within sixty feet of the polling place, contrary to the provisions of this chapter, he shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not more than five hundred dollars, or confined in the county jail for not more than thirty days. (1891, c. 89, §81; Code 1923, c. 3, §81; 1963, c. 64.)

Wisconsin

Wis. Stat. §12.64. Electioneering; marking ballot, etc.—

(1) No officer of any election held under Title II shall engage in electioneering on the day of which any such election is held, nor shall any person solicit votes for any candidate or party or engage in any electioneering whatever on the day of any such election within 100 feet of any entrance to any building containing any polling place, nor remove any ballot from any polling place before the polls are closed, nor show his ballot after it is marked to any person in such a way as to reveal the mark or marks made thereon, nor solicit any person to so show his ballot.

TABLE VII

STATUTES BANNING ADVERTISEMENT FOR DIVORCE

Arizona

Ariz. Stat. T.13 §263. Advertising the procurement of divorces or annulments; punishment.—A person who advertises, prints, publishes, distributes or circulates, any advertisement or offer to procure or obtain, or to aid in procuring or obtaining, a divorce, or annulment of a marriage, or offers to engage, appear or act as attorney, counsel or referee in a suit for alimony, divorce or annulment of marriage, either in this state or elsewhere is guilty of a misdemeanor.

Illinois

Ill. Stat. 40 §22. Advertising for divorces pronibited. —Penalty.—Whoever advertises, prints, publishes, distributes or circulates, or causes to be advertised, printed, published, distributed, or circulated, any circular, pamphlet, card, hand-bill, advertisement, printed paper, book, newspaper, or notice of any kind, with intent to procure, or to aid in procuring any divorce, either in this state or elsewhere, shall be fined not less than one hundred dollars ($100.00), nor more than one thousand dollars ($1,000.00), for each offense, or imprisoned in the county jail not less than three months nor more than one year, or both in the discretion of the court. This act shall not apply to the printing or publishing of any notice, or advertisement required or authorized by any statute of the State of Illinois. 1877, April 12, Laws 1877, p. 95 1.

Indiana

Ind. Stat. 10-3109 (2863). Promoting divorces.—Whoever advertises, prints, publishes, distributes, or circulates, or causes to be advertised, printed, published, distributed or circulated, any pamphlet, circular, card, hand bill, advertisement, printed paper, book, newspaper or notice of any kind, advertising or calling attention to the procuring of divorces, either in this state or elsewhere, shall on conviction, be fined not less than ten dollars ($10.00) nor more than one hundred dollars ($100.00).

Massachusetts

Mass. Stat. 208 §43. Advertisement to procure divorce.—Whoever writes, prints or publishes, or solicits another to write, print or publish, any notice, circular or advertisement soliciting employment in the business of procuring divorces or offering inducements for the purpose of procuring such employment shall be punished by a fine of not more than two hundred dollars or by imprisonment for not more than six months.

Minnesota

Minn. Stat. §518.29. Advertisment soliciting divorce business prohibited. Every person who shall advertise, print, publish, distribute, or circulate, or cause to be advertised, printed, published, distributed, or circulated, any pamphlet, card, handbill, circular, advertisement, printed paper, book, newspaper, or notice of any kind, offering to procure or obtain, or to aid in procuring or obtaining, any divorce, or the severance, dissolution, or nullity of any marriage, or offering to engage, appear, or act as

attorney, counsel or referee in any suit for divorce, alimony, or the severance, dissolution, or nullity of any marriage, either in this state or elsewhere, shall be guilty of a gross misdemeanor and punished by imprisonment in the county jail for not more than six months or by fine of not less than $100 nor more than $500.

New York

N. Y. Stat. Art. 21 §337. Advertising to procure divorces.—Whoever prints, publishes, distributes or circulates, or causes to be printed, published, distributed or circulated any circular, pamphlet, card, hand bill, advertisement, printed paper, book, newspaper or notice of any kind offering to advise on laws of any foreign state, nation or jurisdiction for the express purpose of procuring or aiding in procuring any divorce, severance, dissolution, or annulment or any marriage, or offering to procure or to aid in procuring any divorce, or the severance, dissolution, or annulment of any marriage, or offering to engage, appear or act as attorney or counsel in any suit for alimony or divorce or the severance, dissolution, or annulment of any marriage, either in this state or elsewhere, is guilty of a misdemeanor. This section shall not apply to the printing or publishing of any notice or advertisement required or authorized by any law of this state. Added L.1965, c. 1031, §68, eff. Sept. 1, 1967.

South Carolina

S. C. Stat. §20-120. Advertising to procure divorce illegal.—It shall be unlawful for any person to print, publish, distribute or circulate or cause to be printed, published, distributed or circulated any card, handbill, advertisement, printed paper, book, newspaper or notice of

any kind offering or otherwise to advertise to procure, attempt to procure or aid in procuring any divorce either in this State or elsewhere. But this section shall not apply to the printing or publishing of any notice or advertisement required or authorized by the laws of this State. (1952 Code §20-120; 1949 (46) 216.)

Virginia

Va. Stat. §20-122. Advertising offer to obtain divorces.—Whosoever prints, publishes, distributes, or circulates, or causes to be printed, published, distributed, or circulated, any circular, pamphlet, card, handbill, advertisement, printed paper, book, newspaper, or notice of any kind offering to procure, or aid in procuring, any divorce, or the severance, dissolution, or annulment of any marriage, and by such publication as above mentioned offers to engage, appear, or act as attorney or counsel in any suit for alimony, divorce, or the severance, dissolution, or annulment of marriage, either in this State or elsewhere, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than one hundred dollars nor more than three hundred dollars, and the person so convicted shall, in addition to the above penalty, be disbarred from practicing as such attorney at law in the courts of this Commonwealth. This section shall not apply to the printing or publishing of any notice or advertisement required or authorized by any law of this State or orders of any court. (Code 1919, §5116.)

Washington

Wash. Stat. 9.04.020. Advertising divorce business.—Every person who shall cause to be published in any newspaper, magazine or other publication, or who shall cause

or allow to be posted or distributed, in any place frequented by the public, any card or notice offering to procure or obtain, or to directly or indirectly aid in procuring or obtaining any divorce or the dissolution or nullification of any marriage either in this state or elsewhere, shall be guilty of a misdemeanor. Any advertisement stating or intimating that any person is a specialist in "the laws of husband and wife" or "domestic relations", or is engaged in the business of procuring divorces, shall be considered a violation of this section.

West Virginia

W. Va. Stat. §48-2-29. Advertising of any offer to obtain divorces prohibited.—Whosoever prints, publishes, distributes, or circulates, or causes to be printed, published, distributed, or circulated, any circular, pamphlet, card, handbill, advertisement, printed paper, book, newspaper, or notice of any kind, offering to procure, or aid in procuring, any divorce, or the severance, dissolution, or annulment of any marriage, or, by such publication as above mentioned, offers to engage, appear or act as attorney or counsel in any action for alimony, divorce, or the severance, dissolution, or annulment of marriage, either in this State or elsewhere, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred nor more than three hundred dollars, and if the person so convicted be an attorney at law he shall, in addition to the above penalty, be disbarred from practicing as such attorney at law in the courts of this State. This section shall not apply to the printing or publishing of any notice or advertisement required or authorized by any law of this State or orders of any court. (1931 Code, § 48-2-30. 1969, c. 49.)

TABLE VIII

RETRACTION STATUTES MITIGATING DAMAGES

Alabama

Ala. Stat. T.7, §913. (7360) (3749) (1441) (2728) (2972) (2623) (2221) Retraction mitigates damages.—The defendant in an action of slander or libel may prove under the general issue in mitigation of damages that the charge was made by mistake or through inadvertence, and that he has retracted the charge and offered amends before suit by publishing an apology in a newspaper when the charge had been thus promulgated, in a prominent position; or verbally, in the presence of witnesses, when the accusation was verbal or written, and had offered to certify the same in writing.

California

Cal. Stat. P.R. §48a. [Demand and publication or broadcast of correction]

1. In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover no more than special damages unless a correction be demanded and be not published or broadcast, as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statements claimed to be libelous.

2. If a correction be demanded within said period and be not published or broadcast in substantially as conspicuous a manner in said newspaper or on said broadcasting station as were the statements claimed to be libelous, in a regular issue thereof published or broadcast within three weeks after such service, plaintiff, if he pleads and proves such notice, demand and failure to correct, and if his cause of action be maintained, may recover general, special and exemplary damages; provided that no exemplary damages may be recovered unless the plaintiff shall prove that defendant made the publication or broadcast with actual malice and then only in the discretion of the court or jury, and actual malice shall not be inferred or presumed from the publication or broadcast.

3. A correction published or broadcast in substantially as conspicuous a manner in said newspaper or on said broadcasting station as the statements claimed in the complaint to be libelous, prior to receipt of a demand therefor, shall be of the same force and effect as though such correction had been published or broadcast within three weeks after a demand therefor.

4. As used herein, the terms "general damages", "special damages", "exemplary damages" and "actual malice", are defined as follows:

(a) "General damages" are damages for loss of reputation, shame, mortification and hurt feelings;

(b) "Special damages" are all damages which plaintiff alleges and proves that he has suffered in respect to his property, business, trade, profession or occupation, including such amounts of money as the plaintiff alleges

and proves he has expended as a result of the alleged libel, and no other;

(c) "Exemplary damages" are damages which may in the discretion of the court or jury be recovered in addition to general and special damages for the sake of example and by way of punishing a defendant who has made the publication or broadcast with actual malice;

(d) "Actual malice" is that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication or broadcast at the time it is published or broadcast shall not constitute actual malice.

Connecticut

Conn. Stat. §52-237. Damages in actions for libel.—In any action for a libel the defendant may give proof of intention; and unless the plaintiff proves either malice in fact or that the defendant, after having been requested by him in writing to retract the libelous charge, in as public a manner as that in which it was made, failed to do so within a reasonable time, he shall recover nothing but such actual damage as he may have specially alleged and proved. (1949 Rev., §7983.)

Delaware

Del. Stat. 10, §3919. Libel actions; notice; effect of publication in good faith and retraction.

(a) Before any action, either civil or criminal, is brought for the publication in a newspaper of a libel, the

plaintiff or prosecutor shall at least five days before instituting such action serve notice in writing on the defendant specifying the article and the statements therein which he alleges to be false and defamatory.

(b) If it appears upon the trial that the article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in the article were true, and that within ten days after the service of the notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper in which the article appeared, and in as conspicuous a place and type as was the original article, then the plaintiff in such case, if a civil action, shall recover only actual damages, and if, in a criminal proceeding, a verdict of "guilty" is rendered on such a state of facts, the defendant shall be fined a penny and the costs, and no more.

(c) Subsections (a) and (b) of this section shall not apply to anonymous communications and publications.

§3919. Repealed. 52 Del.Laws, Ch. 214, eff. Jan. 21, 1960.

Section related to notice required in libel actions and effect of publication in good faith and retraction.

Passage Over Governor's Veto. 52 Del.Laws, Ch. 214, which repealed this section, became a law on Jan. 21, 1960, without the approval of the Governor and in accordance with Art. 3, §18 of Delaware Constitution.

Florida

Fla. Stat. §770.02. Correction, apology, or retraction by newspaper.—If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case shall recover only actual damages.

Fla. Stat. §836.07. Notice condition precedent to prosecution for libel.—Before any criminal action is brought for publication, in a newspaper periodical, of a libel, the prosecutor shall at least five days before instituting such action serve notice in writing on defendant, specifying the article and the statements therein which he alleges to be false and defamatory.

Fla. Stat. §836.08. Correction, apology, or retraction by newspaper.—If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then any criminal proceeding

charging libel based on an article so retracted, shall be discontinued and barred.

Fla. Stat. §836.11. Publications which tend to expose persons to hatred, contempt or ridicule prohibited.—

(1) It shall be unlawful to print, publish, distribute or cause to be printed, published or distributed by any means, or in any manner whatsoever, any publication, handbill, dodger, circular, booklet, pamphlet, leaflet, card, sticker, periodical, literature, paper or other printed material which tends to expose any individual or any religious group to hatred, contempt, ridicule or obloquy unless the following is clearly printed or written thereon:

(a) The true name and post-office address of the person, firm, partnership, corporation or organization causing the same to be printed, published or distributed; and,

(b) If such name is that of a firm, corporation or organization, the name and post-office address of the individual acting in its behalf in causing such printing, publication or distribution.

(2) Any person, firm or corporation violating any of the sections of this statute shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083.

Georgia

Ga. Stat. §105-720. Evidentiary value of request for retraction or failure to make request; effect of retraction

upon punitive damages; pleading retraction.— In any civil action for libel, charging the publication of an erroneous statement alleged to be libelous, it shall be relevant and competent evidence for either party to prove that the plaintiff requested retraction or omitted to request retraction. The defendant may allege and give proof that the matter alleged to have been published and to be libelous was published without malice, and that the defendant in a regular issue of the newspaper or other publication did, within three days after receiving written demand (or in the next regular issue of the newspaper or other publication if the next regular issue be not published within three days after receiving such demand; correct and retract the allegedly libelous statement in as conspicuous and public a manner as that in which the alleged libelous statement was published, and that if the plaintiff so requested, such retraction and correction was accompanied by an editorial appearing in the same issue as the retraction in which the allegedly libelous statement was specifically repudiated, or that no request for correction and retraction was made by the plaintiff. Upon proof of such facts, the plaintiff shall not be entitled to any punitive damages, and the defendant shall be liable only to pay actual damages. The defendant may plead the publication of the correction, retraction or explanation (including the editorial, if demanded) in mitigation of damages. (Acts 1958, p. 54; 1960, pp. 198, 199.)

Indiana

Ind. Stat. §2-1043 [398]. Libel in newspaper.— Action and notice by aggrieved party — Good faith and retraction — Actual damages — Candidate for public office.— Before any suit shall be brought for the publication of a

libel in any newspaper in this state, the aggrieved party shall, at least three [3] days before filing the complaint in such suit, serve notice in writing on the published or publishers of such newspaper, at their principal office of publication, specifying the statements in said article which he or they allege to be false and defamatory. If it shall appear upon trial of said action that said article was published in good faith, that its falsity was due to mistake or misapprehension of the facts, and that a full and fair retraction of any statement therein alleged to be erroneous was published in a regular issue of such newspaper within three [3] days, if such newspaper be a daily publication, or within ten [10] days, if such newspaper be a weekly publication, after such mistake or misapprehension was brought to the knowledge of such publisher or publishers, in as conspicuous place and type in the same place where said original item appeared in such newspaper as was the article complained of, then the plaintiff in such case shall recover only actual damage. Provided, however, that the foregoing provisions of section one of this act shall not apply to the case of any libel against any candidate for a public office in this state, unless the retraction of the charge is made in a conspicuous manner at least three [3] days before the election. [Acts 1895, ch. 45, §1, p. 91.]

Iowa

Iowa Stat. §659.2. Libel — retraction — actual damages.— In any action for damages for the publication of a libel in a newspaper, if the defendant can show that such libelous matter was published through misinformation or mistake, the plaintiff shall recover no more than actual damages, unless a retraction be demanded and refused as hereinafter provided. Plaintiff shall serve upon the pub-

lisher at the principal place of publication a notice specifying the statements claimed to be libelous, and requesting that the same be withdrawn.

Iowa Stat. §659.4. Candidate for office—retraction—time.— If the plaintiff was a candidate for office at the time of the libelous publication, no retraction shall be available unless published in a conspicuous place on the editorial page, nor if the libel was published within two weeks next before the election; provided that this and sections 659.2 and 659.3 shall not apply to any libel imputing unchastity to a woman.

Kentucky

Ky. Stat. §411.050 [2438b-1] Action for libel; retraction of statement; effect.— In any civil action for libel, charging the publication of an erroneous statement alleged to be libelous, it shall be relevant and competent evidence for either party to prove that the plaintiff requested retraction or omitted to request retraction. The defendant may allege and give proof that the matter alleged to have been published and to be libelous was published without malice, and that the defendant in the next regular issue of the newspaper or publication, after receiving demand in writing or within seven days if no such demand was made, did correct and retract the statement, or in the next regular issue of the newspaper or publication did publish a sufficient correction, retraction or explanation as conspicuously and publicly as that in which the alleged libelous statement was published, in the same type and in the same place in at least two successive issues of the same periodical publication, accompanied by editorials in which the allegedly libelous statement was specifically repudiated.

Upon proof of such facts the plaintiff shall not be entitled to punitive damages, and the defendant shall be liable only to pay actual damages. The defendant may plead the publication of the correction, retraction or explanation in mitigation of damages.

Maine

Me. Stat. T.14, §153. Mitigation of damages in action for libel.— The defendant in an action for libel may prove in mitigation of damages that the charge was made by mistake or through error or by inadvertence and that he has in writing, within a reasonable time after the publication of the charge, retracted the charge and denied its truth as publicly and as fully as he made the charge. He may prove in mitigation of damages that the plaintiff has already recovered or has brought action for damages for, or has received compensation for, substantially the same libel as that for which said action was brought. R.S. 1954, c. 113, §48; 1959, c. 317, §175.

Massachusetts

Mass. Stat. Ch. 231, §93. Retraction of libel; mitigation of damages; punitive damages.— Where the defendant in an action for libel, at any time after the publication of the libel hereinafter referred to, either before or after such action is brought, but before the answer is required to be filed therein, gives written notice to the plaintiff or to his attorney of his intention to publish a retraction of the libel, accompanied by a copy of the retraction which he intends to publish, and the retraction is published, he may prove such publication, and, if the plaintiff does not accept the offer of retraction, the defendant may prove

such non-acceptance in mitigation of damages. If within a reasonable time after receiving notice in writing from the plaintiff that he claims to be libelled the defendant makes such offer and publishes a reasonable retraction, and such offer is not accepted, he may prove that the alleged libel was published in good faith and without actual malice, and, unless the proof is successfully rebutted, the plaintiff shall recover only for any actual damage sustained. In no action of slander or libel shall exemplary or punitive damages be allowed, whether because of actual malice or want of good faith or for any other reason. Proof of actual malice shall not enhance the damages recoverable for injury to the plaintiff's reputation. As amended St. 1943, c. 360.

Michigan

Mich. Stat. §600.2911. Libel or slander.

. . . .

(2) Libel or slander; damages, actual, exemplary, retraction. (a) Except as provided in (b), in actions based on libel or slander the plaintiff is entitled to recover only for the actual damages which he has suffered in respect to his property, business, trade, profession, occupation, or feelings.

(b) Exemplary and punitive damages shall not be recovered in actions for libel unless the plaintiff, before instituting his action, gives notice to the defendant to publish a retraction and allows a reasonable time to do so, and proof of the publication or correction shall be admissible in evidence under a denial on the question of the good faith of the defendant, and in mitigation and reduction of exemplary or punitive damages. The retraction shall be

published in the same size type, in the same editions and as far as practicable, in substantially the same position as the original libel.

Minnesota

Minn. Stat. §548.06. Damages for libel.— In an action for damages for the publication of a libel in a newspaper, the plaintiff shall recover no more than special damages, unless a retraction be demanded and refused as hereinafter provided. He shall serve upon the publisher at the principal place of publication, a notice, specifying the statements claimed to be libelous, and requesting that the same be withdrawn. If a retraction thereof be not published on the same page and in the same type and the statement headed in 18 point type or larger "RETRACTION", as were the statements complained of, in a regular issue thereof published within one week after such service, he may allege such notice, demand, and failure to retract in his complaint and recover both special and general damages, if his cause of action be maintained. If such retraction be so published, he may still recover general damages, unless the defendant shall show that the libelous publication was made in good faith and under a mistake as to the facts. If the plaintiff was a candidate for office at the time of the libelous publication, no retraction shall be available unless published on the same page and in the same type and the statement headed in 18 point type or larger "RETRACTION," as were the statmeents complained of, in a regular issue thereof published within one week after such service and in a conspicuous place on the editorial page, nor if the libel was published within one week next before the election. This section shall not apply to any libel imputing unchastity to a woman.

Montana

Mont. Stat. §64-207.1. Notice in writing to publisher of libelous or defamatory matter—opportunity to correct —defense and mitigation of damages.—Before any civil action shall be commenced on account of any libelous or defamatory publication in any newspaper, magazine, periodical, radio or television station, the libeled person shall first give those alleged to be responsible or liable for the publication a reasonable opportunity to correct the libelous or defamatory matter. Such opportunity shall be given by notice in writing specifying the article and the statements therein which are claimed to be false and defamatory and a statement of what are claimed to be the true facts. The notice may also state the sources, if any, from which the true facts may be ascertained with definiteness and certainty. The first issue of a newspaper, magazine or periodical published after the expiration of one week from the receipt of such notice shall be within a reasonable time for correction. In the case of radio and television stations, a broadcast made at the same time of day as the broadcast complained of and of at least equal duration, which is made within seven (7) days following receipt of such notice shall be within a reasonable time for correction. To the extent that the true facts are, with reasonable diligence, ascertainable with definiteness and certainty, only a retraction shall constitute a correction; otherwise the publication of the libeled person's statement of the true facts, or so much thereof as shall not be libelous of another, scurrilous, or otherwise improper for publication, published as his statement, shall constitute a correction within the meaning of this section. If it shall appear upon trial that the publication was made under honest mistake or misapprehension, then a correction,

timely published, without comment, in a position and type as prominent as the alleged libel, or in a broadcast made at the same time of day as the broadcast complained of and of at least equal duration, shall constitute a defense against the recovery of any damages except actual damages, as well as being competent and material in mitigation of actual damages to the extent the correction published does so mitigate them.

Nebraska

Neb. Stat. §25-840.01. Libel; damages; retraction; effect. (1) In an action for damages for the publication of a libel by any medium, the plaintiff shall recover no more than special damages, unless correction was requested, as herein provided, and was not published. Within twenty days after knowledge of the publication, plaintiff shall have given each defendant a notice by registered mail specifying the statements claimed to be libelous and specifically requesting correction. Publication of a correction shall be made within three weeks after receipt of the request. It shall be made in substantially as conspicuous a manner as the original publication about which complaint was made. A correction, published prior to receipt of a request therefor, shall have the same force and effect as if published after such request. The term special damages, as used in this section, shall include only such damages as plaintiff alleges and proves were suffered in respect to his property, business, trade, profession or occupation as the direct and proximate result of the defendant's publication.

(2) This section shall not apply if it is alleged and proved that the publication was prompted by actual mal-

ice, and actual malice shall not be inferred or presumed from the publication.

New Jersey

N. J. Stat. §2:59-2. Damages recoverable.—The defendant, in an action for libel against the owner, manager, editor, publisher or reporter of any newspaper, magazine, periodical, serial or other publication in this state, may give proof of intention, and plaintiff, unless he shall prove either malice in fact or that defendant, after having been requested by plaintiff in writing to retract the libelous charge in as public a manner as that in which it was made, failed to do so within a reasonable time, shall recover only his actual damage proved and specially alleged in the complaint.

North Carolina

N. C. Stat. §99-2. Effect of publication or broadcast in good faith and retraction.—(a) If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within 10 days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case, if a civil action, shall recover only actual damages, and if, in a criminal proceeding, a verdict of "guilty" is rendered on such a state of facts, the defendant shall be fined a penny and the costs, and no more.

(b) If it appears upon the trial that such words or acts were conveyed and broadcast in good faith, that their falsity was due to an honest mistake of the facts, or without prior knowledge or approval of such station, and if with prior knowledge or approval that there were reasonable grounds for believing that the words or acts were true, and that within 10 days after the service of said notice a full and fair correction, apology and retraction was conveyed or broadcast by or over such radio or television station at approximately the same time of day and by the same sending power so as to be as visible and audible as the original acts or words complained of, then the plaintiff in such case, if a civil action, shall recover only actual damages, and if, in a criminal proceeding, a verdict of "guilty" is rendered on such state of facts, the defendant shall be fined a penny and costs, and no more. (1901, c. 557; Rev., s. 2013; C.S., s. 2430; 1943, c. 238, s. 2.)

North Dakota

N. D. Stat. §14-02-08. Libel suits against newspapers —Retraction.—Before any suit for libel can be brought against a newspaper, other than for the libel of or concerning a female, the party aggrieved, at least three days before filing his complaint, must serve notice on the publisher of such newspaper at the principal office of its publication, specifying the statement alleged to be false and defamatory. If on the trial it appears that the article was published in good faith, and its falsity was due to a misapprehension in regard to the facts, and a full and fair retraction of the erroneous statement was published in the next issue of the paper, or in the case of a daily paper, within three days after the mistake was brought to the attention of the publisher, in as conspicuous a place

and type as the original article, the plaintiff will be entitled to recover only such damages as he can show he has sustained to his property, business, trade, profession, or occupation. If the libel is against a candidate for office, the retraction also must be made editorially, and in the case of a daily paper, at least three days before the election, and in the case of a weekly paper, at least ten days before the election.

Ohio

Ohio Stat. §2739.14. Publishing corrected statements. (GC §6319-4) — Whenever demand has been made for the publication of statements or articles under section 2739.13 of the Revised Code, the newspaper company shall print and circulate the same in the next regular issue or within forty-eight hours following the receipt of such statement or article. Such statement or article shall be phrased in proper language and be printed without any additions to, or omissions therefrom, in the same color of ink, from like type, with headlines of equal prominence, occupying a like space in the same portion of the newspaper as was used in printing the original article complained of, and shall be given the same publicity in all respects and, as nearly as possible, the same circulation as such original article. Such company shall print and publish such statements or articles without cost to such persons or their representatives; and such publication may be proved at the trial of a suit for damages as a mitigating circumstance to reduce damages, provided that any voluntary publication made without demand may be used to rebut any presumption of malice or injury on the part of such company growing out of the original publication to which the same related. This section does not prevent the injured party

from alleging and proving actual malice on the part of the publisher and any special damages resulting to him therefrom.

Oklahoma

Okla. Stat. Ch. 25, §1446a. Good faith in publishing libel — Retraction — Actual damages only — Jury question — Exceptions. — In an action for damages for the publication of a libel in a newspaper or periodical, if the evidence shows that the article was published in good faith and that its falsity was due to an honest mistake of the facts, and the question of "honest mistake" shall be a question of fact to be determined by a jury, unless a jury be waived by the parties, the plaintiff shall be entitled to recover actual damages only unless a retraction be requested and refused as hereinafter provided. The person claiming to have been libeled shall notify the publisher, either orally or in writing, stating or setting forth the particular matter claimed to be libelous and requesting that the same be retracted. If a retraction, headed "RETRACTION" in eighteen point type or larger, be published on the same page and in the same type as were the statements complained of, in two regular issues of said newspaper or periodical, published within a reasonable time, but not to exceed two weeks after such notice in a weekly newspaper, or not to exceed one week in a daily newspaper, the publication of said retraction shall be full and complete satisfaction as to all other than actual damages, and the plaintiff shall not be entitled to recover other than actual damages on account of such erroneous published matter. If such a retraction be not so published, plaintiff may recover such damages as are provided by the statutes of this State, if his cause of action be maintained. This Section shall not apply to any

libel imputing unchastity to a woman; nor in any case in which the evidence shows the publication was made maliciously or with a premeditated intention and purpose to injure, defame or destroy the reputation of another or to injuriously alter a person's reputation; nor to anonymous communications or publications, and provided further that this Section shall not apply to any article pertaining to any candidate for any public office when said article is published within three weeks of the date of the primary, run-off primary, special or general election, as the case may be. Laws 1941, p. 37, §1.

Oregon

Ore. Stat. §30.165. Publication of correction or retraction upon demand.

(1) The demand for correction or retraction shall be in writing, signed by the defamed person or his attorney and be delivered to the publisher of the defamatory statement, either personally or by registered mail at the publisher's place of business or residence within 20 days after the defamed person receives actual knowledge of the defamatory statement. The demand shall specify which statements are false and defamatory and request that they be corrected or retracted. The demand may also refer to the sources from which the true facts may be ascertained with accuracy.

(2) The publisher of the defamatory statement shall have not more than two weeks after receipt of the demand for correction or retraction in which to investigate the demand; and, after making such investigation, he shall publish the correction or retraction in:

(a) The first issue thereafter published, in the case of newspapers, magazines or other printed periodicals.

(b) The first broadcast or telecast thereafter made, in the case of radio or television stations.

(c) The first public exhibition thereafter made, in the case of motion picture theatres.

(3) The correction or retraction shall consist of a statement by the publisher substantially to the effect that the defamatory statements previously made are not factually supported and that the publisher regrets the original publication thereof.

(4) The correction or retraction shall be published in substantially as conspicuous a manner as the defamatory statement. [1955 c. 365, §3]

South Dakota

S. D. Stat. §20-11-7. Retraction notice to newspaper — Punitive damages avoided by retraction — Candidates for office. — Before any action for libel can be brought against a newspaper or the publisher, editor, or manager thereof, other than a libel of or concerning a female, the party aggrieved must at least three days before the commencement of such action serve a notice on the person or persons against whom said action is to be brought specifying particularly the statement or statements claimed to be false and defamatory, and if on the trial it appears that such statement or statements were written or published in good faith and with the belief founded upon reasonable grounds that the same were true, and a full and fair retraction of

the erroneous matter correcting any and all misstatements of fact therein contained was published in the next issue of the paper, or in the case of a daily paper within three days after the mistake was brought to the attention of the publisher, editor, or manager in as conspicuous type as the original statement and the same position in the paper, the plaintiff will be entitled to recover no punitive damages. But if the libel is against a candidate for office the retraction must also be made editorially in the case of a daily paper at least three days and in the case of a weekly paper at least ten days before the election.

Texas

Tex. Stat. T. 88, Art. 5431 [5596]. Mitigation of damages. — In any action for libel, in determining the extent and source of actual damage and in mitigation of exemplary or punitive damage, the defendant may give in evidence, if specially pleaded, all material facts and circumstances surrounding such claim of damage and the defense thereto, and also all facts and circumstances under which the libelous publication was made, and any public apology, correction or retraction made and published by him of the libel complained of, and may also give in evidence, if specially pleaded in mitigation of exemplary or punitive damage, the intention with which the libelous publication was made. The truth of the statement, or statements, in such publication shall be a defense to such action. Acts 1901, p. 30; Acts 1927, 40th Leg., p. 121, ch. 80, §1.

Utah

Utah Stat. §45-2-1. Retraction by newspapers — Limit of Recovery. — If it shall appear on the trial of any action brought for the publication of any alleged libel in any newspaper published in this state that the alleged libel was published in good faith, that the publication thereof was due to mistake or misapprehension of the facts, and that a full and fair retraction of any statement therein alleged to be erroneous was published in the same type and in the same position on the same page as was the article complained of as libelous, in the next regular issue of such newspaper, or in case of a daily paper within three days, after service upon the publisher of such newspaper, at the principal office of its publication by the party aggrieved, of a written notice specifying the statement alleged to be erroneous, or, in case such notice is not served in the issue or within the time above specified after the filing of the complaint and service of the summons in said action, then the plaintiff shall recover only actual damages; provided, that if such libel was published in a Sunday edition, the publication of the retraction must have been in a Sunday edition within two weeks after the times above specified; provided, further, that this section shall not apply in the case of any libel against any candidate for a public office at any election or primary, or any avowed candidate for nomination to any office before any political convention, unless the retraction of the charge was made editorially in a conspicuous manner at least five days before the holding of such election, primary or political convention in case such libelous article was published in a daily paper, or if published in a weekly paper, at least three days before the holding thereof, which editorial retraction shall be in lieu of any other retraction herein provided for.

Virginia

Va. Stat. §8-632. Mitigation in actions against newspapers, etc. — In any civil action against the publisher, owner, editor, reporter or employee of any newspaper, magazine or periodical under §8-630, or for libel or defamation, because of any article, statement or other matter contained in any such newspaper, magazine or periodical, the defendant, whether punitive damages be sought or not, may introduce in evidence in mitigation of general and punitive damages, or either, but not of actual pecuniary damages, all the circumstances of the publication, including the source of the information, its character as affording reasonable ground of reliance, any prior publication elsewhere of similar purport, the lack of negligence or malice on the part of the defendant, the good faith of the defendant in such publication, or that apology or retraction, if any, was made with reasonable promptness and fairness; provided that the defendant may introduce in evidence only such circumstances and to the extent set forth in his or its grounds of defense. (1934, p. 495; Michie Code 1942, §6240a; 1954, c. 333.)

West Virginia

W. Va. Stat. §57-2-4. Justification and mitigation of damages in action for defamation. — In any action for defamation, the defendant may justify by alleging and proving that the words spoken or written were true, and after notice in writing of his intention to do so (given to the plaintiff at the time of, or for, pleading to such action) may give in evidence in mitigation of damages that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon after-

wards as he had an opportunity of doing so, in case action shall have been commenced before there was an opportunity of making or offering such apology. (Code 1849, c. 176, §44; Code 1860, c. 176, §45; Code 1868, c. 130, §47; 1882, c. 160, §47; Code 1923, c. 130, §47.)

Wisconsin

Wis. Stat. §895.05. Damages in actions for libel.

(1) The proprietor, publisher, editor, writer or reporter upon any newspaper published in this state shall not be liable in any civil action for libel for the publication in such newspaper of a true and fair report of any judicial, legislative or other public official proceeding authorized by law or of any public statement, speech, argument or debate in the course of such proceeding. This section shall not be construed to exempt any such proprietor, publisher, editor, writer or reporter from liability for any libelous matter contained in any headline or headings to any such report, or to libelous remarks or comments added or interpolated in any such report or made and published concerning the same, which remarks or comments were not uttered by the person libeled or spoken concerning him in the course of such proceeding by some other person.

(2) Before any civil action shall be commenced on account of any libelous publication in any newspaper, magazine or periodical, the libeled person shall first give those alleged to be responsible or liable for the publication a reasonable opportunity to correct the libelous matter. Such opportunity shall be given by notice in writing specifying the article and the statements therein which are claimed to be false and defamatory and a statement of

what are claimed to be the true facts. The notice may also state the sources, if any, from which the true facts may be ascertained with definiteness and certainty. The first issue published after the expiration of one week from the receipt of such notice shall be within a reasonable time for correction. To the extent that the true facts are, with reasonable diligence, ascertainable with definiteness and certainty, only a retraction shall constitute a correction; otherwise the publication of the libeled person's statement of the true facts, or so much thereof as shall not be libelous of another, scurrilous, or otherwise improper for publication, published as his statement, shall constitute a correction within the meaning of this section. A correction, timely published, without comment, in a position and type as prominent as the alleged libel, shall constitute a defense against the recovery of any damages except actual damages, as well as being competent and material in mitigation of actual damages to the extent the correction published does so mitigate them.

TABLE IX

STATUTORY REGULATION OF PUBLICATION OF INFORMATION WITH SEXUAL CONNOTATIONS

Alabama

Ala. Stat. T. 22 §274. (4379). Advertisements concerning impotency, prostatic troubles, etc. — Any person who shall, directly or indirectly, publish, deliver, distribute, or cause to be published, delivered, or distributed in any manner, whatsoever, any advertisement concerning lost manhood, lost vitality, impotency, sexual weakness, seminal

emissions, stricture, drains, discharges, prostatic troubles, self-abuse or excessive sexual indulgences or calling attention to any medicine, article or preparation that may be used therefor, or to any person or persons from whom, or any office or place at which, information, treatment or advice relating to such diseases, infirmity, habit, or condition may be obtained, shall be guilty of a misdemeanor, and upon coviction shall be punished by a fine of not less than ten dollars nor more than one hundred dollars. This section shall not apply to the advertising of any patent medicine not used or recommended for the treatment of venereal diseases, nor shall it apply to didactic or scientific treatises which do not advertise or call attention to any person or persons from whom, or any place at which information, treatment or advice may be obtained, nor shall it apply to advertisements or notices issued by legally constituted health authorities in the discharge of their official duties. (1919, p. 909.)

Arizona

Ariz. Stat. §13-213. Advertising to produce abortion or prevent conception; punishment. — A person who wilfully writes, composes or publishes a notice or advertisement of any medicine or means for producing or facilitating a miscarriage or abortion, or for prevention of conception, or who offers his services by a notice, advertisement or otherwise, to assist in the accomplishement of any such purposes, is guilty of a misdemeanor.

California

Cal. Stat. Div. 2, Ch. 1, Art. 5, §600. Advertisements concerning venereal diseases, etc.: Punishment. — It is

unlawful for any person, firm, corporation or association, except boards of health or agencies approved by the State Department of Public Health, to post or otherwise exhibit or distribute in any manner whatsoever in any place, any advertising or other printed matter concerning venereal diseases, lost manhood, lost vitality, impotency, seminal emissions, self-abuse, varicocele, or excessive sexual indulgence and calling attention to any medicine, device, compound, treatment or preparation that may be used therefor.

Any person violating the provisions of this section shall upon conviction therefor be punished by a fine of not more than five hundred dollars or by imprisonment in the county jail for not more than one year or by both such fine and imprisonment.

Cal. Stat. Div. 2, Ch. 1, Art. 5, §601. Advertising medicine or offering services to produce miscarriage or abortion: Felony. — Every person who wilfully writes, composes or publishes any notice or advertisement of any medicine or means for producing or facilitating a miscarriage or abortion, or for the prevention of conception, or who offers his services by any notice, advertisement, or otherwise, to assist in the accomplishment of any such purpose, is guilty of a felony and shall be punished as provided in the Penal Code.

Colorado

Colo. Stat. 40-9-26. Advertising cures for sexual disease.—It shall be unlawful for any person, association, society, partnership or corporation to circulate, disseminate, spread, print, publish, or cause the circulation, dissemination, spreading, printing or publication of any pub-

lic advertisement, announcement, publication, notice or information of the treatment, alleviation, palliation, cure or prevention of any sexual or menstrual disease, weakness or condition; or to display, or expose to the public view, on any public street, alley or road, any instrument, device or thing designed or intended or sold for the treatment, cure, alleviation, palliation or prevention of any sexual or menstrual disease, weakness or condition. But this section and section 40-9-27 shall not prevent such publication and dissemination of any such advertisement in exclusively medical publications and publications designed and circulated among dealers as trade journals, not for public inspection.

Connecticut

Conn. Stat. Ch. 939, § 53-31. Encouraging the commission of abortion.—Any person who, by publication, lecture or otherwise or by advertisement or by the sale or circulation of any publication, encourages or prompts to the commission of the offenses described in section 53-29 or 53-30, or who sells or advertises medicines or instruments or other devices for the commission of any of said offenses except to a licensed physician or to a hospital approved by the state department of health, or who advertises any so-called monthly regulator for women, shall be fined not more than five hundred dollars or imprisoned not more than one year or both. (1949 Rev., § 8365.)

Delaware

Del. Stat. T. 11, § 302. Advertising means of procuring abortion.—Whoever advertises, prints, publishes,

distributes or circulates any pamphlet, printed paper, book, newspaper, notice, advertisement, or reference, containing words or language giving or conveying any notice, hint or reference to any person, or to the real or fictitious name of any person from whom, or to any place, house, shop, or office where anything whatsoever, or any instrument or means whatsoever, or any advice, direction, information or knowledge may be obtained for the purpose of causing or procuring the miscarriage of any pregnant woman, shall be fined not less than $50 nor more than $200, and imprisoned not more than 1 year.

Del. Stat. T. 16, § 2502. Displaying or advertising sale of contraceptives.—No person shall exhibit, display or expose for sale any appliance, drug or medicinal preparation intended or having special utility for the prevention of conception or venereal disease, or exhibit, display or expose any container, or package therefor descriptive or suggestive of the contents, or advertise the sale of the same by any placards, billboards, handbills, newspapers, periodicals, signs, or by any means of publication either visual or auditory, and either individually or by broadcast.

Florida

Fla. Stat. § 797.02. Advertising drugs, etc., for abortion.—Whoever knowingly advertises, prints, publishes, distributes or circulates, or knowingly causes to be advertised, printed, published, distributed or circulated, any pamphlet, printed paper, book, newspaper notice, advertisement or reference containing words or language giving or conveying any notice, hint or reference to any person, or the name of any person, real or fictitious, from

whom, or to any place, house, shop or office where any poison, drug, mixture, preparation, medicine or noxious thing, or any instrument or means whatever, or any advice, direction, information or knowledge may be obtained for the purpose of causing or procuring the miscarriage of any woman pregnant with child, shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083. Amended by Laws 1971, c. 71-136, § 771, eff. Jan. 1, 1972.

Fla. Stat. §742.09 (Bastardy). Publishing names; penalty.—It shall be unlawful for the owner, publisher, manager or operator of any newspaper, magazine, radio station or other publication of any kind whatsoever, or any other person responsible therefor, or any radio broadcaster, to publish the name of any of the parties to any court proceeding instituted or prosecuted under this act; and any person violating this provision shall be guilty of a misdemeanor and be punished by imprisonment in the county jail not exceeding twelve months or by fine not exceeding one thousand dollars or both.

Fla. Stat. 836.02. Must give name of the party written about.—No person shall print, write, publish, circulate or distribute within this state any newspaper, magazine, periodical, pamphlet or other publication of any character, either written or printed, wherein the alleged immoral acts of any person are stated or pretended to be stated, or wherein it is intimated that any person has been guilty of any immorality, unless such written or printed publication shall in such article publish in full the true name of the person intended to be charged with the commission of such acts of immorality.

Any person convicted of any violation of this section shall be punished by a fine not to exceed five hundred dollars, or by imprisonment not to exceed one year. Any person who shall aid in any way in the writing or printing of any literature in violation of this section shall be punished in the same manner as the principal might be punished upon conviction; provided, nothing in this section shall apply to mechanical employees in printing offices, or to newsboys.

Fla. Stat. 794.03. Unlawful to publish name of female raped, etc.—No person shall print and publish or cause to be printed and published in any newspaper, magazine, periodical or any other publication in the State the name or identity of any female raped or upon whom an assault with intent to commit rape has been committed or may be committed.

Idaho

Idaho Stat. 18-603. Advertising medicines or other means for preventing conception, or facilitating miscarriage or abortion.—Every person who wilfully publishes any notice or advertisement of any medicine or means for producing or facilitating a miscarriage or abortion, or for the prevention of conception, or who offers his services by any notice, advertisement, or otherwise to assist in the accomplishment of any such purpose, is guilty of a felony. (R. S., R. C., & C. L., § 6843; C. S., § 8306; I. C. A., § 17-2103.)

Maine

Me. Stat. T. 17, § 2902. Notices for cure of venereal diseases.—It shall be unlawful for any person to publish

or cause to be published, to deliver or distribute or cause to be delivered or distributed, in any manner whatsoever, or to post or display, or to permit to be posted, displayed or to remain on any buildings, windows or outhouses, or premises or other surface owned or controlled by him in this State, or to have displayed in or on any window or place where the same could be read by passers-by or the public, any advertisement, label, statement, print or writing which refers to any person or persons from whom or to any means by which, or to any office or place at which may be obtained any treatment or cure for syphilis, gonorrhea, chancroid, lost manhood, sexual weakness, lost vitality, impotency, seminal emissions, gleet varicocele or self-abuse whether described by such names, words, terms or phrases, or by any other names, words, terms or phrases calculated or intended to convey to the reader the idea that any of said diseases, infirmities, disabilities, conditions, or habits mentioned in this section. . . .

Any person violating any of the provisions of this section shall be punished by a fine of not more than $100 or by imprisonment for not more than 3 months, or by both.

Maryland

Md. Stat. Art. 27, § 322. Advertising cures.—No person or persons, firm, company or corporation, shall advertise or permit to be advertised, or in any manner whatsoever call public attention to, any drug, medicine, preparation or substance for the treatment, alleviation or cure of gonorrhea, syphilis, chancroid or any other venereal disease or of any diseased condition of the human genitalia caused by, related to, or resulting from the afore-

said venereal diseases, or to any person from whom, or to any place at which, such drug, medicine, preparation or substance may be obtained, except that the provisions of this section shall not apply to any health department or other governmental agency, or to any health or medical agency approved under this section by the State Board of Health, or to medical, pharmaceutical or other professional publications not subject to public sale or distribution, or to bona fide news items or bona fide articles, published in newspapers, magazines or books. Any person violating the provisions of this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than five hundred dollars ($500.00) for each such violation. (An. Code, 1951, § 386; 1943, ch. 724, § 366A.)

Massachusetts

Mass. Stat. 272, §21. Instruments or other articles for self-abuse, prevention of conception or abortion, in general.—Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument, or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints, or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not

more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars.

Mass. Stat. 272, § 29. Statements relative to diseases or infirmities of sexual organs and places for information and treatment.—Whoever publishes, delivers, distributes, or causes to be published, delivered or distributed, an advertisement, statement or notice, other than a label which is attached to a bottle or package of medicine, or which is contained in a sealed package of medicine, describing the causes, symptoms, details or effects of a venereal disease, or of a disease, infirmity or condition of the sexual organs for the purpose of calling attention to or advertising a person from whom, or an office or place at which, information, treatment or advice may be obtained concerning such diseases or conditions, shall be punished by imprisonment for not more than six months or by a fine of not less than fifty nor more than five hundred dollars, or both. This Section shall not apply to the printing or delivering in sealed packages outside this commonwealth of books pamphlets or circulars containing such advertisements, nor to newspapers printed outside this commonwealth, nor to the printing, publishing or distribution of any matter pertaining to venereal diseases by state or municipal health authorities.

Michigan

Mich. Stat. 750.15. Abortion, drugs or medicine, advertising or sale to procure.—Selling drugs, etc., to produce abortion.—Any person who shall in any manner, except as hereinafter provided, advertise, publish, sell or publicly expose for sale any pills, powder, drugs or combination of drugs, designed expressly for the use of fe-

males for the purpose of procuring an abortion, shall be guilty of a misdemeanor.

Any drug or medicine known to be designed and expressly prepared for producing an abortion, shall only be sold upon the written prescription of an established practicing physician of the city, village, or township in which the sale is made; and the druggist or dealer selling the same shall, in a book for that purpose, register the name of the purchaser, the date of the sale, the kind and quantity of the medicine sold, and the name and residence of the physician prescribing the same.

Mich. Stat. 750.40. Private diseases, conceptive preventatives; publication cures. Publication in indecent language of cures for private diseases and conceptive preventatives. The publication or sale within this state of any circular, pamphlet or book containing recipes or prescriptions in indecent or obscene language for the cure of chronic female complaints or private diseases, or recipes or prescriptions for drops, pills, tinctures, or other compounds designed to prevent conception, or tending to produce miscarriage or abortion is hereby prohibited; and for each copy thereof, so published and sold, containing such prohibited recipes or prescriptions, the publisher and seller shall each be guilty of a misdemeanor.

Montana

Mont. Stat. 94-3609. (11142) Advertising to produce miscarriage. Every person who willfully writes, composes or publishes any notice or advertisement of any medicine or means for producing or facilitating a miscarriage or abortion, or, for the prevention of conception, or who of-

fers his services by any notice, advertisement or otherwise, to assist in the accomplishment of such purpose is guilty of a misdemeanor.

Mont. Stat. 94-3611. (11144) Prohibition against a certain class of advertisements. No newspaper or other paper published or circulated in whole or in part within the state of Montana shall contain advertisements of cures, appliances, or treatments for certain diseases or disorders, to wit: stricture, syphilis, impotency, gonorrhea, emissions, and so-called "lost manhood", and other private diseases of men and women, and their complications.

Mont. Stat. 94-3617. (11148.2) Contraceptives and prophylactics, advertising of, forbidden. It shall be unlawful to exhibit or display prophylactics or contraceptives in any show window, upon the streets, or in any public place other than in the place of business of a licensed pharmacist, or to advertise such in any magazine, newspaper or other form of publication, originating in, or published within the state of Montana; to publish, or distribute from house to house or upon the streets, any circular, booklet or other form of advertising, or by other visual means, or by auditory method or by radio broadcast; or by the use of outside signs on stores, billboards, window displays or other advertising visible to persons upon the streets or public highways; provided, however, that nothing in this act shall prevent the advertising of prophylactics or contraceptives in the trade press of those magazines whose principal circulation is to the medical and pharmaceutical professions; or to those magazines and other publications having interstate circulation, originating outside of the state of Montana where the adver-

tising does not violate any United States law or federal postal regulation; nor to the furnishing within the store or place of business of a licensed pharmacist, to persons qualified to purchase, and then only upon their inquiry, such printed or other information as is requisite to proper use in relation to any merchandise coming within the provisions of this act.

Nebraska

Neb. Stat. 28-923. Venereal diseases; advertising cures; penalty.— Whoever prints or publishes or causes to be printed or published in any newspaper, periodical, circulars, posters, labels or pamphlets published or circulated in this state, any advertisement of medicine, drug, nostrum or apparatus for the cure of private or venereal diseases, or shall circulate or distribute any newspaper, periodical, circulars, posters, labels, or pamphlets containing such an advertisement or notice mentioned in this section, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars nor less than fifty dollars, or be imprisoned in the county jail not more than one year, or by both.

Nevada

Nev. Stat. 441.290. Unlawful acts; penalties.—

2. Any person causing the name of any person against whom any mandamus proceeding or criminal prosecution is instituted, as provided for by this chapter, to appear in any newspaper or magazine without the consent of such person, or any person who reveals the

name of any such person except as authorized by this chapter, or as such person shall consent, is guilty of a misdemeanor.

(Part 13:179:1937; 1931 NCL § 5317.23) + (Part 15:179:1937; 1931 NCL § 5317.25) — (NRS A 1967, 578).

Nev. Stat. 202.200. Advertising goods and services to produce miscarriage.—

1. It shall be unlawful for any person:

(a) To advertise or publish, or cause to be advertised or published in a newspaper, pamphlet, handbill, book or otherwise, any medicine, nostrum, drug, substance, instrument or device to produce the miscarriage or premature delivery of a woman pregnant with child, or which purports to be, or is represented to be, productive of such miscarriage or premature delivery; or

(b) To advertise in any manner his or her services, aid, assistance or advice, or the services, assistance or advice of any other person, in the procurement of such miscarriage or premature delivery.

Nev. Stat. 202.220. Circulation of publications containing prohibited matter forbidden. — Every person who shall knowingly sell, distribute, give away, or in any manner dispose of or exhibit to another person any newspaper, pamphlet, book, periodical, handbill, printed slip or writing, or cause the same to be so sold, distributed, disposed of, or exhibited, containing any advertisement prohibited in NRS 202.200, or containing any description or notice of,

or reference to, or information concerning, or direction how or where to procure any medicine, drug, nostrum, substance, device, instrument or service, the advertisement of which is prohibited or declared to be unlawful, shall be guilty of a misdemeanor. (Part 1911 C&P §190; RL §6455; NCL §10137) — NRS A 1967, 484).

Nev. Stat. 202.240. Advertising treatment, cures, prevention of sexual disorders. —

1. "Persons" as used in this section means natural persons, copartnerships, corporations and association, and shall include persons of both sexes.

2. It shall be unlawful for any person to publish or cause to be published, to deliver or distribute or cause to be delivered or distributed in any manner whatsoever, or to post, or display, or knowingly to permit to be posted, displayed, or to remain on any buildings, windows or outhouses, or premises or other surface owned or controlled by him in the State of Nevada, or to manufacture or sell, or knowingly to have displayed in or on any window or place where the same could be read by passers-by or the public, any advertisement, label, statement, print or writing which refers to any person or persons from whom, or to any means by which, or to any office or place at which may be obtained any treatment or cure of syphilis, gonorrhea, chancroid, lost manhood, sexual weakness, lost vitality, impotency, seminal emissions, gleet, varicocele or self-abuse, whether described by such names, words, terms or phrases, or by any other names, words, terms or phrases, calculated or intended to convey to the reader the idea that any of the diseases, infirmities, disabilities, conditions or habits are meant or referred to, or which refers to any

medicine, article, device or preparation that may be used for the treatment, cure or prevention of any of the diseases, infirmities, disabilities, conditions or habits mentioned in this section.

3. Any person violating any of the provisions of this section is guilty of a misdemeanor.

4. This section shall not apply to publications, advertisements or notices of the United States Government, the State of Nevada or of any city or town or other political subdivision of the State of Nevada. (1:221:1921; NCL §10531) + (2:221:1921; NCL §10532) + (3:221:1921; NCL §10533) + (4:221:1921; NCL §10534) — (NRS A 1967, 484).

New Jersey

N. J. Stat. 2A:170-76. Uttering or exposing to view instruments, medicines, etc., to prevent conception or procure abortion. — Any person who, without just cause, utters or exposes to the view of another, or possesses with intent to utter or expose to the view of another, or to sell the same, any instrument, medicine or other thing, designed or purporting to be designed for the prevention of conception or the procuring of abortion, or who in any way advertises or aids in advertising the same, or in any manner, whether by recommendation for, or against its use or otherwise, gives or causes to be given, or aids in giving any information how or where any such instrument, medicine or other thing may be had, seen, bought or sold, is a disorderly person.

North Dakota

N. D. Stat. 23-12-06. Advertising certain cures and drugs and specialization prohibited — Penalty. — Any person who shall:

1. Advertise in his own name or in the name of another person, firm or pretended firm, association, or corporation or pretended corporation, in any newspaper, pamphlet, circular, or other written or printed paper, a claim or advertisement with regard to the treatment or curing of venereal diseases or the restoration of "lost manhood" or "lost vitality";

2. Permit any advertisement of the kind specified in subsection 1 to be printed, inserted, or published in any newspaper or periodical of which he is the owner, publisher, or manager;

3. Advertise in any manner that he is a specialist in diseases of the sexual organs, or in diseases caused by sexual weakness or self-abuse, or in any disease with like or similar causes;

4. Advertise in any manner any medicine, drug compound, appliance, or any means whatever, whereby it is claimed that sexual diseases of men and women may be cured or relieved, or miscarriage or abortion produced;

5. Advertise in any manner any medicine or means whereby the monthly periods of women can be regulated or the menses re-established if suppressed; or

6. Publish, distribute, or cause to be published or distributed or circulated, any of the advertising matter mentioned in the preceding subsections of this section,

shall be guilty of a misdemeanor and shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail for not more than six months.

Oregon

Ore. Stat. 435.110. Display of contraceptives prohibited; advertising regulations.—

1. No person shall display or expose for sale any of the articles described in ORS 435.010.

2. No person shall advertise the articles described in ORS 435.010 in a manner that is not discreet and tasteful. (Amended by 1969 c. 328 §6)

Ore. Stat. 434.250. Advertising and publishing of cures for certain diseases of urogenital organs prohibited.

1. No person shall advertise or publish any advertisement intended to imply or to be understood that he will restore manly vigor, treat or cure lost manhood, lost power, stricture, gonorrhea, chronic urethral discharges, gleet, varicocele or syphilis.

2. No person shall advertise any medicine, medicinal preparation, remedy or prescription for any of the ailments or diseases listed in subsection 1 of this section.

3. No owner or managing officer of any newspaper shall print or publish in his paper any advertisement of the type described in subsections 1 and 2 of this section.

Ore. Stat. 434.260. Advertising and distributing of cures for diseases of urogenital organs prohibited; approved agencies excepted. — No persons, except boards of health or agencies approved by the State Board of Health, shall publish, deliver or distribute, or cause to be published, delivered or distributed in any manner whatever, or permit placards or posters to be or remain on buildings or outhouses or premises controlled by him containing an advertisement concerning venereal disease, lost manhood, lost vitality, impotency, sexual weakness, seminal emissions, varicocele, self-abuse or excessive sexual indulgence and calling attention to a medicine, article or preparation that may be used therefor or to a person from whom, or an office or place at which information, treatment or advice may be obtained.

Pennsylvania

Pa. Stat. T. 18, Ch. 1, §783. Selling or advertising medicines, etc., to produce abortion; giving, selling, or advertising obscene books, etc.; proceedings on complaint of offense. — A magistrate having jurisdiction to issue warrants in criminal cases, upon complaint that any person within his jurisdiction is offending against the provisions of this act, supported by oath or affirmation, must issue a warrant directed to the sheriff, or to any constable, marshal or police officer within the county directing him to search for, seize and take possession of any of the articles specified in this chapter in the possession of the person against whom complaint is made. The magistrate must

immediately transmit every article seized by virtue of the warrant to the district attorney of the county, who must, upon conviction of the person from whose possession the same was taken, cause it to be destroyed, and the fact of such destruction to be entered upon the records of the court in which the conviction is had. 1897, May 12, P.L. 63, §3.

Rhode Island

R. I. Stat. 11-3-4. Advertising or selling services or drugs to procure miscarriage. — Every person who knowingly advertises, prints, publishes, distributes or circulates, or knowingly causes to be advertised, printed, published, distributed or circulated, any pamphlet, printed paper, book, newspaper, notice advertisement or reference containing words or language giving or conveying any notice, hint or reference to any person, or to the name of any person, real or fictitious, from whom, or to any place, house, shop or office where, any poison, drug, mixture, preparation, medicine, or noxious thing, or any instrument or means whatsoever, or any advice, direction, information or knowledge, may be obtained for the purpose of causing or procuring the miscarriage of a woman pregnant with child, or who knowingly exhibits, advertises or sells to be used for such purpose any poison, drug, mixture, preparation, medicine, noxious thing, instrument or means whatsoever, or who, with or without any charge therefor, gives to any person any advice, information, instruction or direction for the purpose of causing or assisting in any such miscarriage, shall be punished by imprisonment for not more than two (2) years, or by a fine of not more than one thousand dollars ($1,000), or by both.

South Carolina

S. C. Stat. Ch. 3, §16-81. Misdemeanor to publish name of person raped, etc. — Whoever publishes or causes to be published the name of any woman, maid or woman child upon whom the crime of rape or an assault with intent to ravish has been committed or alleged to have been committed in this State in any newspaper, magazine or other publication shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars or imprisonment of not more than three years. But the provisions of this section shall not apply to publications made by order of court. (1952 Code §16-81; 1942 Code §1275; 1932 Code §1275; Cr. C. '22 §170; Cr. C. '12 §317; 1909 (26) 208.)

Texas

Tex. Stat. T. 12, Ch. 1, Art. 702. Private disease posters. — Any person who shall publish, deliver or distribute, or cause to be published, delivered or distributed in any manner, or who shall permit placards or posters to be or remain on buildings, outhouses or premises controlled by him, containing an advertisement concerning a venereal disease, lost manhood, lost vitality, impotency, sexual weakness or emissions, varicocele, self-abuse or excessive sexual indulgence and calling attention to a medicine, article or preparation that may be used therefor or to a person from whom or place at which information, treatment or condition may be obtained shall be fined not more than two hundred dollars. Acts 4th C.S. 1918, p. 195.

Utah

Utah Stat. 58-19-10. Advertising and display. — It shall be unlawful to show or display prophylactics in any show window facing a public street, highway or passageway, upon the streets or in any public place, or to advertise in any magazine, newspaper or other form of publication, originating in, or published within the state of Utah, to distribute from house to house or upon the streets, any circular, booklet or other form of advertising, or by visual means or auditory method or by radio broadcast; or by the use of outside signs on stores, billboards, window display or other advertising visible to persons upon the street or public highway.

Provided, however, that nothing in this act shall prevent the advertising of prophylactics in the trade press or those magazines whose principal circulation is to the medical and pharmaceutical professions; to those magazines and other publications having interstate circulation, originating outside the State of Utah where the advertising does not violate any United States law or federal postal regulation; nor to the furnishing within the store or place of business of a licensee, to persons qualified to purchase such printed or other information as is needed in relation to any prophylactics coming within the provisions of this act. History: L. 1937, ch. 97, §11; C. 1943, 79-12a-11.

Vermont

Vt. Stat. T. 13, Ch. 5, §104. Advertising or dealing in anything to cause miscarriage. — A person who knowingly causes to be made public by print, writing, words or language that give any information where anything, or any

advice or information, may be obtained for the purpose of causing or procuring the miscarriage of a pregnant woman, shall be imprisoned in the state prison not more than ten years nor less than one year and fined not more than $500.00 nor less than $200.00.

Vt. Stat. 305. Advertisements for cure of sexual disease, disabilities or habits. — A person shall not publish or cause to be published, deliver or distribute or cause to be delivered or distributed in any manner whatsoever, or post, display, or permit to be posted, displayed, or to remain on any building, windows, or out-houses, or premises, or other surface owned or controlled by him or to have displayed in or on any window or place where the same could be read by passers-by or the public, any advertisement, label, statement, print or writing which refers to any person from whom, or to any means by which, or to any office or place at which, may be obtained any treatment or cure for syphilis, gonorrhea, chancroid, lost manhood, sexual weakness, lost vitality, impotency, seminal emissions, gleet, varicocele, or self-abuse, whether described by such names, words, terms or phrases, or by any other means, words, terms or phrases, calculated or intended to convey to the reader the idea that any of such diseases, infirmities, disabilities, conditions, or habits are meant or referred to, or which refers to any medicine, article, device or preparation that may be used for the treatment, cure or prevention of any of the diseases, infirmities, disabilities, conditions or habits mentioned in this section.

Source.V.S. 1947, §8583. P.L. §8717. 1921, No. 213, §1.

Virginia

Va. Stat. 32-103. Venereal disease, etc., advertisements. — It shall be unlawful for any person, firm, corporation or association, except boards of health or agencies approved by the State Board of Health, to post or otherwise exhibit or distribute in any manner whatsoever in any place any advertisement or other printed matter concerning venereal diseases, lost manhood, lost vitality, impotency, seminal emissions, self-abuse, varicocele or excessive sexual indulgence, and calling attention to any medicine or preparation that may be used therefor.

For each and every violation of this section the defendant upon conviction shall be fined not less than ten dollars nor more than one hundred dollars. (1918, p. 561; Michie Code 1942, §1554m.)

Washington

Wash. Stat. 9.04.030, Advertising cures of venereal diseases, lost vitality — Monthly regulators. — Every person who shall advertise, either in his own name, or in the name of another person, copartnership or pretended copartnership, association, corporation or pretended corporation, in any newspaper, pamphlet, circular, periodical or in any other written or printed paper, and every owner, publisher, editor or manager of any newspaper, pamphlet, circular, periodical or other written or printed paper, who shall publish, or permit to be published or inserted, an advertisement in any newspaper, pamphlet, circular, periodical, or other written or printed paper, owned or controlled by him, or of which he is the editor or manager, and every person who shall distribute, circulate, display or cause to

be distributed, circulated or displayed, any newspaper, pamphlet, circular, periodical, or other written or printed paper containing any advertisement for the treatment or care of venereal diseases, the restoration of lost manhood, or of lost vitality or lost vigor, or monthly regulators for women, or the treatment of diseases of the sexual organs, or diseases caused by sexual vice, self-abuse or any disease of like cause, or the sale of any medicine, drug, compound, mixture, appliance, or any means whatever, whereby sexual diseases of men or women may be cured or relieved, shall be guilty of a gross misdemeanor.

Wash. Stat. 9.68.020. Prohibited publications.— Every person who shall publish, and every proprietor, manager or editor who shall permit to be published, in any book, newspaper, magazine or other printed publication circulated wholly or in part in this state—

1. Any detailed account of the commission or attempted commission of the crime of rape, carnal knowledge, seduction, adultery, sodomy or any other sexual crime, or of the trial of any person charged therewith; or,

2. Any detailed account of the execution of any person convicted of crime; or,

3. Any detailed statement of any evidence of indecent, obscene or immoral acts offered in any trial or proceeding; or,

4. Any interview with, advertisement for, communication from or account of the actions of any public prostitute, except upon a matter concerning public welfare;

Shall be guilty of a misdemeanor.

West Virginia

W. Va. Stat. 16-4-25. Advertisements concerning venereal disease, etc.; penalty; exceptions.— Whosoever publishes, delivers or distributes or causes to be published, delivered or distributed in any manner whatsoever, in this State, any advertisement concerning a venereal disease, lost manhood, lost vitality, impotency, sexual weakness, seminal emissions, varicocele, self-abuse or excessive sexual indulgence, and calling attention to a medicine, article or preparation that may be used therefor, or to a person or persons from whom, or an office or place at which, information, treatment or advice relating to such disease, infirmity, habit or condition may be obtained, is guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred nor more than three hundred dollars, or imprisonment in the county jail not to exceed six months, or both, in the discretion of the court.

Nothing in this section shall be construed as to prevent legitimate and legal public notices, placards, etc., issued under the direction of the state department of health or as to prevent sending out literature by either the state department of health or the United States public health service. (1919, c. 73, § § 1, 2, 3; Code 1923, c. 150, § 13.)

Wisconsin

Wis. Stat. T. 15, 143.075. Sexual and venereal diseases; advertising; treatment of; penalty.— Any person who shall advertise in any manner, either in his own name or under the name of another person, firm or pretended firm, association, corporation or pretended corpo-

ration, in any newspaper, pamphlet, circular or other written or printed paper, the treatment and curing of venereal diseases, the restoration of "lost manhood" or who shall advertise in any manner that he is a specialist in diseases of the sexual organs or diseases caused by sexual weakness, self-abuse, or excessive sexual indulgence or in any diseases of a like nature or produced by like causes, or who shall advertise in any manner any medicine, drug, compound or any means whatever whereby sexual and venereal diseases of men and women may be cured or relieved or abortion or miscarriage produced, and the owner, publisher or manager of any newspaper who shall publish any such advertisement or permit or allow any such advertisement to be inserted and published in any newspaper owned or controlled by him or in which he has an interest, and any person, firm or corporation who shall sell, offer for sale, keep for sale, give away or otherwise dispose of any newspaper, pamphlet, circular, or other written or printed paper containing any such advertisement, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than $25 nor more than $100.

Wis. Stat. T. 45, 942.02. Communication of identity of victim of offensive crime.—

1. Whoever does either of the following may be fined not more than $500 or imprisoned not more than one year in county jail or both:

(a) Intentionally publishes in any radio or television broadcast, newspaper, magazine, or other similar method of disseminating news to the public, the identity of any living person as a victim or the identity of any living per-

son who is the victim of the crime of rape, sexual intercourse without consent, sexual intercourse with a child, sexual perversion, or indecent behavior with a child, which crime is alleged to have occurred in this state; or

(b) With intent that it be so published in this or another state, communicates to another the identity of such person.

2. This section does not apply to publications or communications necessary in the official investigation, institution, prosecution, or defense of any civil or criminal court proceeding or in the compilation of the records pertaining thereto.

Wyoming

Wyo. Stat. 6-105. Advertising drug or nostrum for procuring abortion or miscarriage.— Whoever prints or publishes any advertisement of any drug or nostrum with intent to obtain utilization of such drug or nostrum for procuring abortion or miscarriage; or sells or gives away, or keeps for sale or gratuitous distribution, any newspaper, circular, pamphlet, or book containing such advertisement, or any account or description, of such drug or nostrum with intent to obtain utilization of such drugs or nostrum to procure abortion or miscarriage, shall be fined not more than one hundred dollars, to which may be added imprisonment in the county jail for not more than six months. (Laws 1890, ch. 73, § 83; R. S. 1899, § 5063; C. S. 1910, § 5913; C. S. 1920, § 7202; R. S. 1931, § 32-520; C. S. 1945, § 9-515; Laws 1969, ch. 32, § 9.)

TABLE X

BOYCOTT STATUTES

Alabama

Ala. Stat. T. 14, Ch. 20, § 56. (3449). Printing or circulating notice of boycott forbidden.— Any person, firm, corporation or association of persons who prints, or circulates any notice of boycott, boycott cards, stickers, dodgers, or unfair lists, publishing or declaring that a boycott or ban exists or has existed or is contemplated against any person, firm, corporation, or association of persons doing a lawful business, shall be guilty of a misdemeanor. (1921, p. 31.)

Colorado

Colo. Stat. 80-11-12. Unlawful to publish notice of boycott.— It shall be unlawful to print or circulate any notice of boycott, boycott card, sticker, banner, sign or dodger, publishing or declaring that a boycott or ban exists, or has existed or is contemplated against any person, firm, or corporation doing a lawful business, or publish the name of any judicial officer or other public officer upon any notice of boycott, boycott card, sticker, banner, sign or other similar list, because of any lawful act or decision of such official.

FILED
APR 3 1
MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY
a division of
KNIGHT NEWSPAPERS, INC.,

Appellant,

v.

PAT L. TORNILLO, JR.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF OF THE NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, AMICUS CURIAE, IN SUPPORT OF AFFIRMANCE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

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THE MIAMI HERALD PUBLISHING COMPANY
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KNIGHT NEWSPAPERS, INC.,

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v.

PAT L. TORNILLO, JR.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF OF THE NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, AMICUS CURIAE, IN SUPPORT OF AFFIRMANCE

The National Citizens Committee for Broadcasting submits this brief as *amicus curiae* in support of affirmance of the judgment of the Supreme Court of Florida, entered on July 18, 1973, *rehearing denied*, October 10, 1973, which judgment upheld the constitutionality of Section 104.38 of the Florida Statutes. Both parties to this action have given their written consent to

the filing of this brief pursuant to Supreme Court Rule 42(1). Copies of the letters of consent of the parties have been lodged with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

The National Citizens Committee for Broadcasting (NCCB) is a non-profit membership corporation devoted to assuring the public responsiveness of the broadcast media. NCCB has received financial support from about 16,000 Americans. It achieves its objectives by participating in the regulatory processes affecting media and engages in a wide array of educational and other activities to assist others to do so.

NCCB is not committed to any ideology; its commitment is to open media processes that assure that the public can hear a diversity of ideas in the media. NCCB has several concerns with regard to this case. The First Amendment principles involved in this case can potentially have a major impact on the public's right to obtain access to diverse views. The sweeping and absolute nature of the rights and principles urged upon this Court by the *Herald* and its *amici* supporters leave the public with virtually no recourse if the media fail to provide a spectrum of viewpoints or adequate information with regard to the electoral processes. Finally NCCB is concerned because of the implication, contained in the briefs of several *amici* who have filed in support of the *Herald*, that the Court should use this occasion to in some manner undermine, or at least do nothing to reaffirm, the fairness doctrine as applied to the broadcast media, which NCCB regards as a bedrock of the public's First Amendment right to hear diverse views.

STATEMENT

This case challenges the constitutionality of Section 104.38, Florida Revised Statutes (hereafter "the Reply Statute"). This issue was presented to the court below in the context of a real and substantial legal controversy, not in the context of some hypothetical or threatened application of the statute. Accordingly, we summarize the facts.

1. *The Statute*

As part of a comprehensive statutory scheme designed to assure fairness in the electoral process, the State of Florida in 1909 and 1913 enacted a number of statutes, including the predecessor of the Reply Statute.[1] The Reply Statute, as it is before this Court, provides as follows:[2]

> **104.38 Newspaper assailing candidate in an election; space for reply**
>
> If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to

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[1] Appendix (A.) 18-19.

[2] A. 47.

> comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083.

2. *The Editorials and Replies*

On September 20 and 29, 1972, the Appellant Miami *Herald* ran editorials vigorously attacking Appellee Tornillo's candidacy for the Democratic Party's nomination for a seat in the Florida legislature. The first editorial characterized Tornillo as the "Czar" of the Classroom Teachers Association (CTA) who led a teacher's strike which the editorial called "an illegal act against the public interest." It concluded:

> We cannot say it would be illegal but certainly it would be inexcusable of the voters if they sent Pat Tornillo to Tallahassee to occupy the seat for District 103 in the House of Representatives.[3]

The second editorial accused CTA of illegal activities in supporting Tornillo's candidacy, and characterized Tornillo as the CTA's "acerbic prexy" who "[f]or years now . . . has been kicking the public shin to call attention to his shakedown statesmanship."[4]

On September 27 and 30, 1972, Tornillo submitted to the *Herald* written replies to the respective editorials, requesting that they be printed in accordance with terms of the Reply Statute. Each reply statement was an effort to list the actions taken by both CTA and Tornillo to comply with the laws while seeking to safeguard the economic interests of teachers and the educational interests of the public. Tornillo's September 27 statement concludes:

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[3] A. 5.

[4] A. 8.

> Unfortunately, the Herald dwells on past history and ignores CTA's totally legal efforts of the past four years.
>
> We are proud of our record.[5]

Tornillo's September 30 statement concludes:

> We have attempted to obey all the laws of the state, not intentionally violating any, while continuing our efforts to alert the public to the impending financial crisis facing the schools.
>
> We have, however, also retained our belief in the right of public employees to engage in political activity and to support the candidates of our choice, as is the right of any citizen in this great country of ours.
>
> Aye, there's the rub.[6]

The *Herald* refused to print either reply, in whole or in part.

3. *The Litigation*

On October 1, 1972, Tornillo filed a civil complaint in the Dade County Circuit Court seeking money damages and a mandatory injunction that the *Herald* publish his replies, contending that he

> has neither the means nor the opportunity of responding to the attacks upon him by the Defendant save through the methods permitted by the Legislature in its adoption of F.S. 104.38.[7]

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[5] A. 6-7.

[6] A. 10.

[7] A. 3.

He further alleged that the *Herald's* attack on him had "been deliberately made in close proximity to this election date [the election was to be held on October 3, 1972, just four days after the *Herald's* second editorial] in order to make it impossible for [Tornillo] to reply in an adequate fashion,"[8] so as to materially reduce his chances to secure the nomination.

The trial court held the Reply Statute facially unconstitutional on the grounds that it (1) violates the First Amendment by imposing censorship on the press[9] and (2) is both overbroad and vague in its terms.[10]

On appeal, the Supreme Court of Florida reversed,[11] relying on opinions of this Court stressing the First Amendment's paramount interest in the free flow of information to the electorate. "[U]nderlying First Amendment guarantees there is a broad societal interest in the free flow of information to the public."[12] The court observed "that the First Amendment guarantee is 'not for the benefit of the press so much as for the benefit of us all,' "[13] and that "Freedom of the press . . . is not an end in itself but a means to the end of a free society."[14] The Reply Statute "is designed to add to the flow of information and ideas,"[15] by assuring that

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[8] *Ibid.*

[9] A. 12-13.

[10] A. 13-14.

[11] A. 15-17.

[12] A. 21.

[13] A. 19-20, quoting *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).

[14] A. 20, quoting *Pennekamp v. Florida*, 328 U.S. 331 (1946).

[15] A. 22.

a "reader gets the whole story, rather than half of it."[16] A statute which assures that readers will not be "'blacked out' as to the other side of a controversy,"[17] the court stated, "does not deny to the owners of the instruments of the newspaper industry any right of expression."[18] The Reply Statute imposes no "prior restraint, since no *specified newspaper content is excluded.*"[19]

These considerations are particularly applicable to the Reply Statute, which is designed to achieve the bedrock First Amendment objective of a "fully informed electorate."[20] The statute "was enacted not to punish, coerce or censor the press but rather as a part of a centuries old legislative task of *maintaining conditions conducive to free and fair elections.*"[21] The court perceived a particular need for such regulation in light of "the growing concentration of the ownership of the mass media into

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[16] A. 33.

[17] *Ibid.*

[18] *Ibid.*

[19] A. 22 (emphasis in original). The court later cited *Rosenbloom v. Metromedia*, 403 U.S. 29, 47 (1971):

> If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern.

A. 26.

[20] A. 17.

[21] A. 19 (emphasis in original).

fewer and fewer hands, resulting ultimately in a form of private censorship."[22]

The Florida Supreme Court rejected the void for vagueness argument. The court recognized that a statute which was " 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.' "[23] But it also stated its policy of giving "a statute, if reasonably possible, a construction supporting its constitutionality."[24] In accordance with this policy, the court narrowed the definition of "any reply" to mean a reply

> which is wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar or profane.[25]

As so construed, the court in a *per curiam* opinion found the statute sufficiently clear to withstand constitutional

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[22] A. 22. The court went on to cite this Court's opinion in *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

We would ask the Court to take judicial notice of the fact that metropolitan Miami has but two English language daily newspapers, the *Herald* and the *News*, except on Sundays when they publish a joint edition. In 1972, the *Herald*, a morning paper, had average daily circulation of 354,408, while the *News*, an evening paper, had average daily circulation of 78,119. Thus, the *Herald* had about 82% of the market. *Editor-Publisher Yearbook–1973.*

[23] A. 29, quoting *Brock v. Hardie*, 114 Fla. 670, 154 So. 690, 694 (1934).

[24] A. 30.

[25] *Ibid.*

challenge.[26] A concurring opinion, in which five other justices joined, was filed by Justice Roberts.[27] One Justice dissented.[28]

On rehearing,[29] the court again rejected the charge that the statute was unconstitutionally vague.[30]

This appeal followed.

ARGUMENT

I.

INTRODUCTION

This case presents a unique issue, one qualitatively different from any previously ruled upon by this Court. Contrary to the assertions of the *Herald* and a number of the *amici* supporting it, there is no established precedent that controls this case. At best, prior decisions may provide analogies or guidelines. But they provide no clear

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[26] A. 31.

[27] A. 33.

[28] A. 37.

[29] A. 39.

[30] It found the statute, as construed, similar to two Florida retraction statutes, one of which had earlier withstood constitutional challenge, and under which newspapers in the state had operated for a number of years without any apparent difficulty. A. 41-43. It recognized that it was under a duty to be especially cautious in construing the statute because of its penal nature. But the court found that the instant proceeding was civil in nature, and while the statute might fail to pass constitutional muster on void for vagueness grounds in a criminal prosecution, the penal provision was severable from the remainder of the statute without affecting its viability as a civil law. A. 39-41.

answers to the legal question before the Court. Accordingly, it is important to clarify at the outset what is and what is not involved in this case.

This Court has not previously confronted a constitutional challenge to a legislative effort to balance the following two competing First Amendment interests: (1) a newspaper's right to determine what it will not print and (2) the voting public's right to receive information from the widest possible range of sources, specifically, the electorate's right to be fully informed on electoral issues and the views of candidates.

Only three decisions of the Court have touched upon this delicate matter. *Red Lion Broadcasting Co. v. F.C.C.*,[31] *Columbia Broadcasting System, Inc. v. Democratic National Committee*,[32] and *Mills v. State of Alabama*.[33] While each case is instructive, none is controlling.

Both *Red Lion* and *CBS* involved government regulation of broadcasting, not the print media. *Red Lion* upheld the Federal Communications Commission's personal attack doctrine—which is similar to, but far broader than, the Reply Statute—in the face of a constitutional challenge by broadcasters. That challenge was virtually identical to the challenge here offered by and on behalf of the print media. In *CBS*, the Court rejected arguments that the First Amendment compels broadcasters to sell time to persons wishing to discuss controversial issues. Since broadcasting is subject to comprehensive govern-

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[31] 395 U.S. 367 (1969).

[32] 412 U.S. 94 (1973).

[33] 384 U.S. 214 (1966).

mental regulation, neither of these decisions is dispositive here.[34]

CBS is distinguishable from the instant case on another ground, as well. There, the complainants asserted a right to speak flowing directly from the First Amendment even though there was no statute or regulation conferring such a right. In rejecting the asserted right, the Court followed the *Red Lion* approach of deferring to legislative judgment (as the *Herald* herein contends the Court cannot) and relied upon the existence of the fairness doctrine, as it had been upheld in *Red Lion*, to adequately safeguard the public's First Amendment right to be adequately informed.

While *Mills* did involve a legislative attempt to regulate the print media's discussion of electoral matters, the Alabama statute there in issue sought to punish a newspaper's publication of an editorial position about electoral matters. It involved a legislative effort to prohibit publication, to restrict information available to the electorate. In contrast, the Reply Statute seeks the opposite objective, to expand the views reaching the voters, and leaves unfettered the newspaper's right to publish anything it wishes.

Ordinarily, the two First Amendment interests at issue in this case—an unfettered press discretion to choose the material it will and will not print and the achievement of an informed electorate—coincide. Indeed, it is the core

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[34] *Amicus* takes no position on the technical, physical and economic differences between broadcast and print media which might warrant different governmental regulatory approaches. The record is barren of facts or analysis of this question. The Court need not and, we urge, should not on this record reach that question. See, *infra* at 29-31, 38-39.

assumption of the First Amendment that unrestricted speech and an unfettered press will create a marketplace of ideas in which viewpoints are exchanged and are as open to acceptance or rejection as freely as are commodities in the commercial marketplace.[35] Thus, as this Court has often stressed, and as the court below recognized,[36] the First Amendment guarantee is "not for the benefit of the press so much as for the benefit of us all."[37]

However, the realities of communication in a modern, industrialized society vest in the mass media, especially those which, like the Miami *Herald*, enjoy monoply positions, the power to exclude valuable information from the public as well as the power to inform it.[38] When the danger of such exclusion is great, and the injury it can cause to the First Amendment interest in an informed electorate is serious, legislative efforts to strike a reasonable, non-censoring balance have been accorded great deference by the Court. That is the teaching of both *Red Lion* and *CBS*.

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[35] *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

[36] A. 19-20.

[37] *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).

[38] In *Pennekamp v. Florida*, 328 U.S. 331, 365 (1946) (Frankfurter, J., concurring), this Court emphasized that the power of the press must be tempered with responsibility:

> ". . . the public function which belongs to the press makes it an obligation of honor to exercise this function only with the fullest sense of responsibility. Without such a lively sense of responsibility a free press may readily become a powerful instrument of injustice."

Red Lion sustained the constitutionality of the "fairness doctrine"[39] as applied to the broadcast media.[40] In doing so the Court deferred to the legislative reconciliation of the two First Amendment values, stressing that the public's right to know is paramount. Again in *CBS* the Court was faced with an asserted confrontation between these same two First Amendment values. The Court reaffirmed its commitment to the public's right to know. But it refused to inject constitutional imperatives, deferring again to the legislative judgment that the fairness doctrine adequately served both of the competing First Amendment interests.[41]

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[39] Communications Act of 1934, Section 315, as amended, 47 U.S.C. §315. See Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance. 29 Fed. Reg. 10416 (1964).

[40] We cite *Red Lion* at this point only for the proposition that there can exist a tension between these First Amendment values and that legislative efforts to safeguard the public's right to know will be afforded great deference. As stated above, *supra* at 9-10, *Amicus* believes there is no controlling precedent on the issues presented by the instant case. And as discussed below, *infra* at 28-30, *Amicus* is not attempting to assert that newspapers are or are not on the same regulatory footing as broadcasters, an issue *not* presented by this case. Further, and as is discussed more fully below, *infra* at 28-29, *Amicus* does not believe, as the *Herald* does believe (*Herald* Br. at 20-24), that the decision of the court below turned on the applicability to newspapers of the "scarcity" rationale of *Red Lion*.

[41] Essentially the Court found that the public right to know was satisfied by the "trustee" role conferred upon licensees by the Communications Act of 1934.

Red Lion and *CBS* are important not only because they illustrate the issue involved in this case; they illustrate what is *not* involved in this case. This case does not involve a legislative decision to advance a general police-power interest, such as the need for clean streets, in a way which might incidentally encroach on free speech rights.[42] Nor does it involve an effort to apply a general regulatory law, such as the antitrust laws,[43] or general legal obligation, such as the duty to appear before grand juries,[44] to the press. Thus, the Court is not required to balance public speech interests against governmental non-speech interests in order to determine whether the latter are sufficiently strong and compelling to outweigh the former. Here the task is far more difficult; for the legislature has had to weigh, and this Court must review and weigh the value of, one speech interest against another: the right of newspapers to exclude versus the right of the public to hear all essential points of view.

In this regard, the *Herald's* contention that Florida's interest in fair elections, or any other state interest, is not sufficiently compelling to warrant upholding the Reply Statute[45] is not responsive to the issues in this case.[46]

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[42] Compare *Schneider v. State*, 308 U.S. 147 (1939).

[43] *Associated Press v. United States*, 326 U.S. 1 (1945).

[44] See *Branzburg v. Hayes*, 408 U.S. 665 (1972).

[45] *Herald* Br. at 24-29.

[46] *Mills v. Alabama*, *supra*, contained an analysis of First Amendment rights in the context of elections. However, the only First Amendment right there in issue was the newspaper's interest in being free to publish. The countervailing state interest which Alabama's Supreme Court had held to justify the legislative publication prohibition was "the State's police power." 384 U.S. at

The state's police power over elections is not the only issue here; the primary issue is Florida's legislative judgment reconciling First Amendment interests.

As the Court below observed, the First Amendment interest in an informed electorate, the public's need to know and hear diverse views–the First Amendment interest emphasized by this Court in *Red Lion*–"is most critical during an election campaign."[47]

II.

THE CONSTITUTIONAL IMPERATIVE IN FAVOR OF THE WIDEST POSSIBLE DISSEMINATION OF VIEWS ON PUBLIC ISSUES IS PARTICULARLY COMPELLING IN THE ELECTORAL ARENA AND HAS BEEN SO RECOGNIZED BY BOTH COURTS AND LEGISLATURES.

It is well established that the core purpose of the First Amendment guarantee is "to secure 'the widest possible dissemination of information from diverse and antagonis-

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216. For this reason, and perhaps also because the Alabama statue was designed to restrict speech, the Court engaged in no balancing of First Amendment interests.

In contrast, the court below discussed the state's authority to generally regulate elections (A. 19) only after discussing the bedrock First Amendment interest in an informed electorate and pointing out that it was to achieve such an informed electorate that the Reply Statute was primarily directed. A. 17-18. See text following this note.

[47]A. 18. Indeed, it is somewhat anomalous to even speak of the state's police power over elections unless the precondition for meaningful elections–an informed electorate–has been met. And this precondition is the fundamental precept of popular government. See A. 17-18, quoting James Madison.

tic sources' "[48] and not to protect the private interests of newspapers. As Justice Frankfurter stated in *Associated Press v. United States, supra:*[49]

> I find myself entirely in agreement with [the lower court's opinion by] Judge Learned Hand that "neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."[50]

And as Chief Justice Burger pointed out in his dissenting opinion in *New York Times Co. v. United States,*[51] in arguments before this Court, the newspapers themselves successfully resisted the government's attempt to enjoin publication of the "Pentagon Papers" by asserting "the public 'right to know'."

To assure an adequate flow of information to the public, this Court has steadily broadened the permissible arena of public debate by imposing limitations on the application of libel laws to the press. The Court stated in

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[48] *New York Times Co. v. Sullivan, supra,* 376 U.S. at 266. (1964).

[49] 326 U.S. at 28, (concurring opinion), quoting 52 F.Supp. 362, 372 (1943).

[50] See also *Branzburg v. Hayes, supra,* 408 U.S. at 726-27. (dissenting opinion of Justice Stewart).

[51] 403 U.S. 713, 749 (1971).

New York Times Co. v. Sullivan that attempts to impose libel sanctions must be considered

> against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.[52]

The cases that followed *New York Times Co. v. Sullivan* have re-emphasized the public's interest in securing information about events of public or general interest,[53] or "public figures,"[54] or public officials.[55] It is no accident that most of these cases have confronted this Court with limitations on speech that impeded the flow of information about public officials. And it is similarly no accident that the Court has used its strongest language in protecting the flow of information in cases that have involved public officials or candidates for public office. The Court has recognized that the primary First Amendment goal is to assure an informed electorate:

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[52]376 U.S. at 270.

[53]*E.g., Rosenbloom v. Metromedia,* 403 U.S. 29 (1971). *Cf., Pickering v. Board of Education,* 391 U.S. 563 (1968); *Time, Inc. v. Hill,* 385 U.S. 374 (1967).

[54]*E.g., Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967); *Associated Press v. Walker,* 388 U.S. 130 (1967); *Linn v. Plant Guard Workers,* 383 U.S. 53 (1966).

[55]*E.g., Time, Inc. v. Pape,* 401 U.S. 279 (1971); *Greenbelt Publishing Assn. v. Bresler,* 398 U.S. 6 (1970); *St. Amant v. Thompson,* 390 U.S. 727 (1968); *Beckley Newspapers Corp. v. Hanks,* 389 U.S. 81 (1967); *Rosenblatt v. Baer,* 383 U.S. 75 (1966).

> [I]f . . . the First Amendment was "fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth v. United States*, 354 U.S. 476, 484, then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.[56]

The reason why the Court has focused on an informed electorate is plain. It has long been recognized that protecting the integrity of the electoral processes lies at the very heart of our democratic system of government and the liberties which the Constitution is designed to protect.[57] But for the process to function, citizens must not only be given free access to the ballot box, but must also be armed with sufficient information about the candidates and the issues to make intelligent, informed decisions.

The purpose of the Florida Reply Statute is to provide just such information, and it must be read in that light–in the light of the electorate's right to know. The implementation of this First Amendment interest has been recognized as conferring greater power upon the state than its ordinary police power.[58]

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[56] *Monitor Patroit Co. v. Roy*, 401 U.S. 265, 271-72 (1971).

[57] *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356 (1885).

[58] Compare *Canon v. Justice Court of Lake Valley Judicial District of Eldorado County*, 39 Cal.Rptr. 228, 393 P.2d 429 (Sup. Ct. of Calif. 1964) and *United States v. Scott*, 195 F. Supp. 446 (D.N.D., 1961) (Statutes prohibiting distribution of anonymous campaign literature do not violate the First Amendment) with *Talley v. California*, 362 U.S. 60 (1960) (Ordinance prohibiting distribution of all anonymous handbills voided as impermissible exercise of state police power.)

Newspapers, of course, play a vital, indeed indispensible, role in securing the right of the electorate to be informed. One need not fault their performance, however, to recognize that even innocent acts of omission or commission by newspapers can drastically alter the electorate's ability to be well informed. The legislature thus has a substantial interest in assuring that newspapers do not hinder the flow of information to the electorate, and the First Amendment forms no absolute bar to the exercise of that power. In upholding the application of the antitrust laws to newspapers, this Court stated:

> It would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. . . . Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.[59]

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[59] *Associated Press v. United States, supra,* 326 U.S. at 20 (footnote omitted). In the omitted footnote, the Court observed that the decree, as framed, did not order AP or its members to print or publish anything, but the Court did not say such a course would be prohibited if necessary to implement the decree.

The *Herald* cites *Associated Press* for the proposition that the "only" means for curing monopolization of the media is by application of the antitrust laws. *Herald* Br. at 27. *Associated Press* contains no such limitation; it merely sanctioned use of the antitrust laws as one means of curing monopolization of the media. See text following this note.

If the legislature can prevent private combinations that impose restraints on First Amendment rights, it can also act to prevent individuals from doing so, just as it may act to prevent individuals from imposing restraints on the exercise of other constitutional rights.[60]

Both Congress and the state legislatures have long recognized the need to protect the First Amendment interest in having an informed electorate. The Communications Act mandates that if one candidate appears on the broadcast media, the candidate's opponent(s) will be afforded an "equal opportunit[y]" to appear.[61] The regulations of the Federal Communications Commission ("FCC") require that candidates be informed of and have the opportunity to respond to political editorials endorsing another candidate.[62]

The Federal Elections Campaign Act of 1971[63] expresses an even stronger congressional concern for assuring that the electorate is adequately informed. It limits the rates that *both* newspapers and broadcast media may charge political candidates.[64] The Senate Report accompanying that legislation stated that the rate "limitations will . . . increase the amounts of air time and

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[60]*Cf.*, *eg.*, Civil Rights Act of 1964, Title VII, 42 U.S.C. §§2000e-1, *et seq.*

[61]Communications Act of 1934, Section 315, as amended, 47 U.S.C. §315(a), commonly known as the "equal opportunities provision."

[62]47 C.F.R. 73.123, 73.300, 73.598, 73.679. The constitutionality of these provisions was upheld in *Red Lion, supra.*

[63]86 Stat. 3, 47 U.S.C. §§801 *et seq.* and 2 U.S.C. §§431 *et seq.*

[64]47 U.S.C. §§315, 802, 803.

space which candidates may buy,"[65] resulting in a more informed electorate.[66]

State legislatures have also recognized the need to enact regulations to assure an informed electorate. For example, state statutes similar to the one at issue in *Canon, supra,* which prohibit the distribution of anonymous election material, are quite common.[67]

These statutes are legislative resolutions of the tension between the same First Amendment interests that are present in the instant case. Like the Florida Reply

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[65]Report of the Committee on Commerce on the Federal Elections Campaign Act of 1971, S. 382, Senate Report No. 92-96, 92d Cong., 1st Sess. 38 (1971).

[66]The provisions of the Federal Elections Campaign Act of 1971 are illustrative of the complex constitutional and public interest factors at work in legislative efforts to promote the First Amendment interest in assuring that the electorate is well informed while simultaneously safeguarding the integrity of the electoral process against economic exploitation and corruption. While Congress stressed the need to assure candidates "access to the media" (*id.* at 32) to express their views, and imposed rate limitations to further this objective, Congress restricted the amount of money candidates can spend for media time and space. Congress is still attempting to unravel the complex and closely interrelated First Amendment and other public policy interests touching on the electoral process. It is all the more reason for this Court to allow adequate breathing room for legislative manueverability instead of erecting broad constitutional barriers in the path of reform. See *infra* at 44-54.

[67]See *supra,* note 58. The Appendix to Appellee Tornillo's brief ~~below~~ contains a compilation of state statutes regulating the print media.

Statute, they are designed to increase rather than constrict the flow of information to the public.

The courts have not, of course, hesitated to strike down legislation which is designed to restrict the flow of information to the electorate. In *Mills v. Alabama, supra,* this Court struck down an Alabama statute prohibiting editorials on election day.[68] Similarly, in *American Civil Liberties Union, Inc. v. Jennings,*[69] a three judge district court invalidated the certification procedures of the Federal Elections Campaign Act of 1971[70] which prohibited newspapers from publishing political advertisements unless certain assurances were provided by the sponsoring party.[71]

In *Mills* and *Jennings* newspapers desired to print information relating to elections but were restrained by legislation which made the publisher vulnerable to criminal prosecution for printing the material. In the instant case, the Miami *Herald* has refused to print election

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[68]The Court explicitly found that the statute foreclosed debate:

> The state statute leaves people free to hurl their campaign charges up to the last minute of the day before election. The law held valid by the Alabama Supreme Court then goes on to make it a crime to answer those "last minute" charges on election day, the only time they can be effectively answered. Because the law prevents any adequate reply to these charges, it is wholly ineffective in protecting the electorate. . . .

384 U.S. at 220.

[69]366 F. Supp. 1041 (D.D.C. 1973).

[70]See *supra,* at 20-21.

[71]The newspaper was willing to publish the proferred ad except for the restraining effect of the Act. It joined the plaintiff in seeking to have the certification procedures declared unconstitutional.

information, and the newspaper industry is arguing that it has an unlimited power to restrict the flow of information to the public. The Florida statute, unlike the legislation invalidated in *Mills* and *Jennings*, is designed to insure that unwilling newspapers like the *Herald* print relevant information about candidates. In the instant case it is the newspaper, not the statute, which tends "to restrict the free and unfettered dissemination" of election opinion. Such obstruction, in the name of the First Amendment, "cannot be favorably viewed" by this Court.[72]

III.

THE HERALD AND ITS AMICI HAVE FAILED TO DEMONSTRATE THAT THE FLORIDA LEGISLATURE IS PROHIBITED BY THE FIRST AMENDMENT FROM BALANCING BETWEEN COMPETING FIRST AMENDMENT INTERESTS.

In an effort to convince the Court that the First Amendment works to absolutely and exclusively protect the print media's interest in retaining unfettered power to refuse to print any and all material, Appellant and its *amici* advance three basic arguments: (1) that their position is well established by case law; (2) that the effect of the Reply Statute or, for that matter, any other governmental publication requirement, will be to so severely "chill" newspapers' vigorous treatment of public issues as to be tantamount to direct censorship; and (3) that to permit the Reply Statute to stand would be to countenance the entry of the proverbial "camel's nose" of government censorship into the press "tent", leading inexorably to total government control of the press.

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[72] *Id.* at 1051.

Each of these arguments suffers from the very vagueness and overbreadth that the *Herald* attributes to the Reply Statute. They are without merit and illustrate how untenable is the extreme position urged upon the Court by the mass media. We shall deal with each argument in turn.

A. There Is No Direct Judicial Precedent Holding That the First Amendment Categorically Bars A Legislative Requirement That the Media Print Specified Material.

The *Herald* cites a number of cases as "uniform direct precedents"[73] that the First Amendment prohibits any legislation requiring a newspaper to publish specified election information. However, an examination of the cited cases indicates that no litigated case has invalidated state or federal election legislation on such sweeping grounds.

Chicago Joint Board, Amal. Cloth. Workers v. Chicago Tribune Co.,[74] *Associates & Aldrich Co. v. Times Mirror Co.*,[75] *Avins v. Rutgers*,[76] and *Resident Participation of Denver, Inc. v. Love*,[77] are erroneously cited by the *Herald* as "uniform direct precedents." However, not one of these cases invalidated legislation. Rather, like *CBS*,

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[73] *Herald* Br. at 18.

[74] 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971).

[75] 440 F.2d 133 (9th Cir. 1971).

[76] 385 F.2d 151 (3d Cir. 1967).

[77] 322 F.Supp. 1100 (D. Colo. 1971).

supra, they were unsuccessful attempts to secure *judicial* declaration of a constitutionally compelled right of access to newspapers. The question of state legislation requiring access in electoral or any other circumstances was not addressed.

Brown v. Murphy[78] and *Yablonski v. United Mine Workers of America*,[79] also cited by the *Herald* as direct precedents, are equally inapposite. Both involved individual claims for access on bases other than a statute providing for access.

In *Brown*, the plaintiff sought to judicially compel a magazine to publish a correction or retraction of material which portrayed him exchanging gunfire with police. The District Court denied this relief.[80]

The plaintiff in *Yablonski* sought an injunction directing (1) that a union journal print copy submitted by the plaintiff and (2) that future issues provide fair and equal treatment to the plaintiff's candidacy for the union's presidency. While the court did not require the journal to print the proffered copy, it reasoned that a provision of the Labor Management Reporting and Disclosure Act of 1959 effectively required the journal to give balanced coverage to the two candidates.[81] Thus, *Yablonski*

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[78] 355 F.Supp. 416, 417 (S.D.N.Y. 1973).

[79] 305 F.Supp. 868 (D.D.C. 1969).

[80] The petitioner was on trial in New York State Court. He based his claim to access on his right to a fair trial. The District Court deferred to the state court's procedures for insuring a fair trial. 355 F.Supp. at 418.

[81] The court enjoined the journal from using the union membership lists to distribute copy that discriminated in favor of the incumbent. 305 F.Supp. at 872.

actually relied upon a legislative judgment as to how to deal with an election problem involving sensitive First Amendment interests, imposing a "fairness" requirement which was far more extreme than Florida's Reply Statute.

Even the advisory opinion of the Supreme Judicial Court of Massachusetts, *Opinion of the Justices to the Senate*,[82] falls far short of adopting the *Herald's* position. The *Massachusetts* advisory opinion involved a State Senate request for judicial analysis of the constitutionality of a bill which would have required a publication that sells advertising space to one side of an electoral issue or contest to sell to all sides. The court advised that the proposed legislation would be unconstitutional for a combination of reasons, including the absence of legislative articulation of a compelling public interest;[83] and the danger that newspapers might bar all campaign advertising if carrying some opened the door to all.[84]

It is clear, then, that the *Massachusetts* advisory opinion stands for nothing like the absolute First Amendment straitjacket the *Herald* would impose on legislative efforts to compel access in certain limited electoral situations.[85] Moreover, the *Massachusetts* case illustrates the current state of legislative concern with assuring candi-

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[82] 298 N.E.2d 829 (Mass. 1973) (hereafter *"Massachusetts"*)

[83] *Id.* at 834.

[84] *Ibid.*

[85] Indeed, unlike the instant case, *Massachusetts* did not even involve a reply statute.

date access, a concern which, as indicated above,[86] is shared by the United States Congress.

Contrary to the *Herald's* argument, the only decision of this Court on the subject held that the First Amendment does *not* prohibit all legislative requirements that the print media publish specified material. In *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913), two publishers challenged the validity of a federal statute requiring that all publications utilizing second class postal service publish, on a periodic basis, the names of the publication's ownership and editors, as well as certain other information, including circulation data.[87] The statute also required that all material published for consideration be labeled as an "advertisement".[88] The statute was challenged on the ground, *inter alia*, that it was an infringement on the publishers' First Amendment rights.[89] The Court stated that the publication requirement was a valid exercise of governmental power incident

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[86] Supra at 20-21.

[87] These basic requirements of the statute are presently contained in 39 U.S.C. §4369.

[88] This basic requirement is presently contained in 39 U.S.C. §4367.

[89] Like the *Herald* in the instant case, the publishers in *Lewis Publishing Co. v. Morgan* also argued that the publication requirement was a taking of property in contravention of procedural as well as substantive due process since they were not paid for the space required to publish the information. The Court rejected this challenge, observing that the government had created a "privileged" class of mail users, conferring upon them substantial economic benefit. It did not violate due process for the government to require publications availing themselves of this privilege to utilize their space to make the required disclosures. See 229 U.S. at 316.

to the constitutional power to regulate the use of the postal service. Having granted preferential postal rates to publications, Congress could validly act to assure public exposure to important information.[90]

Finally, to the extent the *Herald* and its *amici* rely on *Mills v. Alabama, supra,* and *ACLU v. Jennings, supra,* as "controlling precedent," they are wide of the mark. As indicated above[91] those cases hold only that the government's interest in fair elections does not countenance legislative restrictions upon or obstacles to speech on electoral issues. Indeed, it was to *afford* public access to the pages of newspapers that *ACLU v. Jennings* struck down Title I of the 1971 Federal Elections Campaign Act.[92]

B. The Herald and Its Amici Have Misconstrued the Meaning of Red Lion and CBS, As Well As the Florida Court's Citation of Red Lion.

The court below made clear that it relied on *Red Lion* only for the constitutional propositions (1) that there is a "First Amendment goal of producing an informed electorate,"[93] and (2) that the Reply Statute reflects a

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[90] Similar regulations governing access to the postal service have also been upheld. *E.g.,* 39 U.S.C. §4005, upheld in *Donaldson v. Read Magazine, Inc.,* 333 U.S. 178 (1948).

[91] *Supra* at 22-23. In addition, the other cases cited in the *Herald* brief (e.g. at 12 n. 22) are even more inapposite. All of them involved direct restraints on speech similar to those in *Mills* and *Jennings.*

[92] 366 F.Supp. at 1053. *Compare, New York Times, Co. v. Sullivan, supra,* 376 U.S. at 266.

[93] A. 24, quoting from *Red Lion*, 395 U.S. at 392.

legislative effort to resolve the tension between that First Amendment goal and the First Amendment goal of leaving newspapers free from any government compulsions.[94] The Florida Supreme Court specifically disclaimed any intention to draw upon *Red Lion* for more than principles "which are applicable to First Amendment guarantees in general."[95]

Apparently unwilling or unable to confront the ramifications of a conflict between First Amendment values, the *Herald* and several newspaper *amici* argue that the court below relied on *Red Lion* to import the Communications Act's "fairness doctrine" wholesale into the print media market. They then attack this straw man by demonstrating that *Red Lion* does not, in its terms, address the print media and by arguing that *Red Lion* holds that different technological barriers to entry into broadcasting and the newspaper business justify differing First Amendment treatment of the two media.[96]

While the print media thus seek to escape *Red Lion's* constitutional principles by [redacted] misreading the holding of the court below, their broadcaster bretheren, in the apparent hope of avoiding any suggestion by the Court that *Red Lion* and the fairness doctrine are still constitutionally alive, ask the Court to decide the instant case without reference to *Red Lion*.[97]

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[94] A. 22-25.

[95] A. 25 Even when it added a dictum to the effect that newspapers make use of electronic media to transmit news, the court below again spoke in terms of the *Red Lion* "principles." A. 32.

[96] *Herald* Br. at 20-22; American Newspaper Publishers Assn. (ANPA) Br. at 5-6; Washington *Post* Br. at 43-48; Reporters' Committee Br. at 7-9.

[97] Radio and Television News Directors Assn. (RTNDA) Br. at 3-5, 15, 20; National Association of Broadcasters (NAB) Br. at 2, 7-8, 10-11, 14-15.

As we have indicated above, neither of these positions is responsive to the Florida Supreme Court's opinion nor to the legal issues pending before the Court. While we agree with the broadcasters that the Court, on this record, has no basis to reconsider either the result reached in *Red Lion* or the constitutional implications of broadcasting's fairness doctrine, surely *Red Lion's* definition of the competing First Amendment interests and their appropriateness for legislative resolution cannot be avoided.

The fairness doctrine is not before the Court, nor does the record contain any evidence which would enable the Court to make a reasoned decision involving it.

Nevertheless, despite its statement that these issues should be kept out of the instant proceeding, RTNDA attempts to begin litigating the "chilling effect" of the fairness doctrine in its *amicus* brief.[98] Yet if anything is clear from the Court's decision last term in *CBS*, it is that the result there was premised in large measure on the continued existence and vitality of the broadcaster's "public trustee" duty under the fairness doctrine to meet the "public interest in being fully and fairly informed."[99]

The Court there further noted the great deference which must be paid to decisions of Congress and the F.C.C. in such delicate regulatory matters.[100] It specifically recognized the Commission's ongoing fairness re-regulation study as a critical part of this "necessarily dynamic process."[101] Having taken this approach, it

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[98]RTNDA Br. at 16-20.

[99]412 U.S. at 111-112.

[100]*Id.* at 103.

[101]*Id.* at 132.

would be particularly anomalous for the Court now to reach out for a re-examination of the fairness doctrine before the Commission's report on its inquiry is even publicly released.[102]

C. Clearly Defined Legislative Requirements that Candidate Information be Published Need Not Impose A "Chill" On Vigorous Newspaper Coverage Of Electoral Issues.

The *Herald*, and many of its media *amici*, argue that the state's determination in this instance to further the public's First Amendment right to hear competing voices on electoral issues will create a "chilling effect" on the freedom of newspapers to cover elections vigorously.[103]

The alleged chill created by the Reply Statute would flow from (1) the fact that if a newspaper covers electoral matters, it will have to make reply space available to attacked candidates, (2) the fact that reply space must be provided for free, thereby allegedly imposing significant

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[102] To follow the logic of *CBS* and *Red Lion*, 395 U.S. at 381-382, the broadcasters appearing as *amici* here should be making their arguments for "reform" to the Commission. It is the Commission which in the first instance must balance the competing First Amendment interests inherent in the fairness doctrine, just as the state legislature and the courts had to resolve those interests in adopting and upholding the newspaper right of reply statute at issue here. Broadcasting standards such as the fairness doctrine are indeed "evolving" ones. *CBS*, 412 U.S. at 110. Therefore their evolution should be left to the primary supervision of the Commission that is charged with responsibility for executing the statutory scheme, as this Court recognized in *CBS*.

[103] See, e.g., *Herald* Br. at 29-30; Washington *Post* at 49-51; Reporter's Committee Br. at 16-19; RTNDA Br., *passim*.

costs on newspaper publishers, and (3) the alleged vagueness and overbreadth of the Reply Statute, which leaves newspapers unsure which coverage of a candidate might trigger the Reply Statute's requirements.

Amicus suggests that this three-pronged chill argument is too speculative to form the basis of a constitutional determination that the Reply Statute infringes too heavily on the newspapers' First Amendment rights. Furthermore, even assuming *arguendo* that the Reply Statute creates a dangerous chill, this constitutes no justification for the media's assertion that, to avoid such "chilling effects," the Court must prohibit all legislative efforts to require the publication of information needed to assure an informed electorate. As we discuss below, it is possible to enact legislation which both protects the electorate's right to be informed and is "chillproof."

1. The Asserted Chilling Effect Is Too Speculative To Support Arguments Of Legislative Unconstitutionality.

We agree, as the Court recently said of similar "chilling effect" arguments advanced by the media in support of their request for a newsman's privilege, that such arguments are "not irrational."[103a] Nevertheless, the "chilling effect" argument here rests on no more firm, specific foundation than the Court found present in *Branzburg*. It thus cannot invalidate a state's statutory determination as to its overriding interests in widening its citizens' First Amendment right to hear divergent views, particularly in the electoral arena.

[103a] *Branzburg v. Hayes, supra,* 408 U.S. at 693.

The "evidence" adduced by newsmen here,[104] far more than the evidence in *Branzburg*, is "unclear" and "speculative".[105] Estimates of the inhibiting effects of the statute in question are similarly "widely divergent"; and those of newsmen are equally based on "professional self-interest."[106] As in *Branzburg*, the print media and broadcaster chill argument "fails to demonstrate that there would be a significant constriction of the flow of news to the public."[107]

As discussed below, the speculative arguments of chill and censorship advanced by the media in the instant case are consistent with a tradition of such efforts. The mass media, broadcast and print, have, in their search for a constitutional shield against any and all public accountability, long been making arguments to this Court of an impending censorship apocalypse, arguments which rarely prove to contain sufficient substance to require the drastic remedy proposed.

2. *The Media's Traditional "Cry Wolf" Arguments Should Be Rejected Here.*

In *Red Lion* the broadcasters made virtually the same contentions as they and the print media advance in the

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[104] See Reporters Committee Brief *Passim*.

[105] 408 U.S. at 694-95.

[106] *Ibid.* The individual *Amici* in the Reporters Committee Brief assert that the Reply Statute may chill their ability to have their writings published in Florida newspapers. We agree that the Court should be sensitive to their need, but we believe the Court should be equally sensitive to the need to ensure that the public hears the views of candidates for public office, like Tornillo.

[107] *Id.* at 694.

instant case – i.e., that editorializing rules would "chill" off the air the discussion of important public issues. Subsequent developments indicate the lack of merit in those projections. *Red Lion* involved a federal rather than a state-created reply remedy. The Court there was bombarded with fervent warnings from the broadcast media that judicial sanction of that remedy, a right of reply, would have precisely the same censoring effects as are argued by the *Herald* and its *amici* in this case, five years later.

In fact, one of the *amici* in this case argued strongly against adoption of the Court's *Red Lion* decision on the very same grounds that it advances here. RTNDA consistently urged from the outset that the FCC's personal attack right of reply rules fostered "self-censorship" that would cause broadcasters to steer "wide of the dangerous zone."[108] RTNDA argued that the "chilling effect" of any rule giving a right of reply to broadcast personal attacks would severely emasculate such programs as Eric Sevareid's commentaries, *Face the Nation*, and network news documentaries.[109] The choices, it claimed, would be solely between elimination of an attack or of an entire program (rejecting out of hand as unworkable the third possibility – complying with the rule by permitting a reply).[110]

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[108] See RTNDA, CBS, NBC Joint Petition for Writ of Certiorari Before Judgment in *RTNDA v. United States* (which was ultimately decided favorably to RTNDA by the 7th Circuit, 400 F.2d 1002 (1968), and consolidated with *Red Lion* in this Court), at 9.

[109] *Id.* at 11-12.

[110] *Id.* at 12. RTNDA restated these arguments in detail in its ultimate brief on the merits of *Red Lion* in this Court. *Red Lion* RTNDA Br. at 31-36. CBS, in the consolidated cases, wrote a

This Court in *Red Lion* properly rejected this line of argument, holding that the "possibility" of media self-censorship was "at best speculative."[111] The Court found, perhaps on the basis of the representations to this effect in at least one network's brief,[112] that the general fairness doctrine obligations imposed on broadcasters had not in the past inhibited robust journalism. To show that the rules would actually reduce rather than expand the diversity of controversial views aired, actual "experience" was necessary.[113] In the final analysis, the Court, as previously noted, held that the First Amendment rights of the public are paramount, and that the governmental choice of a mandatory right of reply was not "inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs."[114]

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separate brief from RTNDA for the stated purpose of trying to demonstrate, by specific examples from its own programs, that the rules would have a deterrent, chilling effect on its broadcast of views on controversial issues. *Red Lion* CBS Br. at 1-2. It submitted a separate Volume II of the Record containing examples from Eric Sevareid's commentaries, *Face the Nation, CBS Reports* and other news documentaries as examples of material upon which the Commission's right of reply rules for personal attacks would have "an insidious, if not totally destructive effect." *Id.* at 4. CBS even argued that under such a rule "news documentary programs as we now know them could not continue. . ." *Id.* at 41.

[111] 395 U.S. at 393.

[112] *Red Lion* CBS Br. at 6-7, 59-62.

[113] 395 U.S. at 393.

[114] 395 U.S. at 392. See also *Mt. Mansfield Television, Inc. v. F.C.C.* 442 F.2d 470 (2nd Cir. 1971) (no assumption would be made of a "speculative" decrease in network controversial programming as a result of adoption of a rule limiting the number of network programs network affiliated television stations may broadcast during prime television viewing hours).

The broadcasters in *Red Lion* also argued, as do the media here, in the instant case, that the practical and financial burdens caused by offering free reply time and the vagueness of the rules at issue there would "chill" their coverage of controversial matters.[115] The Court answered the "vagueness" contention in *Red Lion* by taking the same approach we advocate in this case. It observed that "there was nothing vague about the FCC's specific ruling in *Red Lion*" and stated that it "will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable . . . . but will deal with those problems if and when they arise."[116]

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[115] Ironically the broadcasters' argument there was specifically based on the comparative ease with which a newspaper could comply with a similar right of reply rule. One brief noted that "unlike a newspaper, which has few practical limitations on the number of pages and columns that it can publish, a broadcast station is sharply limited by the finite nature of broadcast time." *Red Lion* CBS Brief at 14. Other "characteristics not shared by the printed press" were adduced to show how much more severely a right of reply requirement would burden broadcasters. These included "the fact that any additional material broadcast necessarily replaces other material, the unpredictable content of unrehearsed interviews or discussions and the practical problems of network program scheduling and station clearance. *Id.* at 4.

[116] 395 U.S. at 395-96 (footnote omitted). The facts and circumstances of the instant case hardly give cause for alarm about the possibility of irational judicial construction. Here there were unquestionably attacks upon the personal character of the candidate Tornillo in two *Herald* editorials. (App. 5, 8) Tornillo submitted statements directly responsive to the editorials, the same length as the editorial (App. 6, 9.) No clearer case could be presented within the statute. Thus, as applied here, under its most narrow construction, the statute gave reasonable notice to the *Herald*.

Looking back over the five years since the *Red Lion* decision, it is difficult to find hard evidence bearing out the broadcasters' predictions of chill on financial burden or any other grounds as well. Eric Sevareid still delivers commentaries with a bite, public figures are still effectively grilled on *Face the Nation*, and network news documentaries still cover controversial issues. In fact, during that period the public saw some of broadcast journalism's most hard hitting coverage, including the *Pentagon Papers*, Vietnam, and, according to some, the widespread emergence of "advocacy journalism."[117]

At the same time, during the past five years, both the general fairness doctrine and the FCC's narrower personal attack and political editorializing right of reply rules have enabled the listening public to hear rebuttal on many issues that might otherwise have been monopolized by views on only one side.[118]

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[117] Certainly the broadcaster *amici* in this case, who now reverse the position of at least some of their brethern in *Red Lion* and attack even the overall fairness doctrine as "chilling," present in their briefs here no specific examples of inhibited broadcast speech.

In fact, the most "chilling" restrictions on mass media sources such as television and newspapers come from the fact that many view their primary functions as vehicles for advertising rather than journalism, and thus are more subject to private economic, rather than governmental, pressures. As to this effect on television journalism, for example, see Friendly, *Due To Circumstances Beyond Our Control* (1967) (esp. Ch. 10. "Common Stock v. the Commonweal"); Brown, *Television, The Business Behind the Box* (1971), Barrett, *Survey of Broadcast Journalism 1970-71*, 83-89 (1971).

[118] In 1972, for example, after a fairness complaint against a Denver television station that had broadcast 60 editorialized station identifications taking a position against a state-wide ballot proposition that would bar the 1976 Olympics from Denver,

Yet even in their briefs in this case, the broadcasters persist in arguing that the fairness doctrine is unworkable. Both NAB and RTNDA argue that the fairness doctrine "has come under increasing question,"[119] and that its critics have included "leading jurists and present and former FCC officials."[120] They then cite several critics of the doctrine, omitting to note its many supporters,[121] a

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supporters of the proposition received two five-minute prime time slots. The proposition was adopted. Like this case, which is taken from an exchange of correspondence in the files of the Citizens Communications Center, most of the cases in which time is actually received are not litigated, and are therefore unreported.

[119] NAB Br. at 2.

[120] RTNDA Br. at 5.

[121] Even of the list adduced of those opposing the fairness doctrine, many, such as former Chairman Burch and former General Counsel Geller, have never disavowed the doctrine; they have questioned its procedural application by the FCC or the wisdom of utilizing the rationales of the past for retaining it in precisely the same administrative form. Two of the RTNDA-cited critics of the doctrine, former FCC Chairman Paul Porter and E. William Henry, are now private attorneys with broadcast clients. Two other RTNDA-cited sources, Sam Ervin and the Cambridge, Massachusetts Conference on "The First Amendment and the News Media," according to the sources cited in their brief, directed their remarks primarily to the doctrine's application to radio rather than television. And the RTNDA-cited article concerning the supposed conversion of Judge J. Skelly Wright (*Broadcasting*, July 11, 1973, p. 28) quotes him as ultimately reaching a conclusion that is the opposite of what RTNDA states:

> "... before we de-regulate the public media in the name of the First Amendment and allow the licensees or the advertisers that support them to manipulate public opinion as they desire, we should proceed with the greatest caution."

number of whom have filed extensive comments in the Commission's pending rule making proceeding on possible changes in the Commission's administration of the fairness doctrine.

Our exploration of the arguments made here by broadcasters and rejected by this Court in *Red Lion* is not meant to indicate that *Amicus* believes that the validity of the broadcast fairness doctrine upheld there is in any way before the Court in this case.[122] Rather, it is intended to show the Court's wisdom in rejecting purely speculative allegations of a potential chilling effect on the exercise of journalistic speech in mass media. As outlined above, this Court has consigned minimal weight to such arguments when, as in both *Red Lion* and the instant case, important competing First Amendment interests, such as the public's interest in hearing diverse viewpoints on controversial issues, are involved.

3. Even If The Reply Statute Creates An Impermissible Restraint On Newspapers' Free Press Rights, A Flat Constitutional Ban On Any Legislative Publication Requirement Is Wholly Unwarranted

Even if the Court were to find a serious potential "chilling effect" on robust presentation of controversial issues by Florida newspapers because of the Reply Statute here at issue, it does not follow that *any* law compelling a newspaper to print *any* matter it does not want to print must perforce violate the First Amendment.[123] A legislature could enact a tightly drawn statute

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[122] See PP. 28-31, *supra.*

[123] See generally, *Lewis, supra,* 229 U.S. at 302-305. See also *The Newspaper Preservation Act,* 15 U.S.C. §1801 (1970) where

that creates no chilling potential. For example, if publishers would refrain from affording vigorous coverage of electoral matters in order to avoid a compulsory reply requirement, surely legislation that granted candidates access regardless of what a paper printed would cause no such chill. Similarly, a statute requiring newspapers to sell space at their prevailing rates to all candidates for public office would be chill-proof. The paper would be given no incentive to self-censor since it would be required to sell space to candidates regardless of what it prints in its news and editorial columns. Likewise, if chill is thought to derive from the Reply Statute's requirement of *free* publication of candidate responses, a statute which provided for paid replies, or compulsory newspaper acceptance of advertising, would not create any such chill. And if vagueness creates a chill, a narrow statute that defined in clear and precise terms when and to what classes of publications it applied would overcome that objection.[124]

Congress, in effect overruling this Court's decision in *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), authorized certain newspapers to enter into joint operating agreements which otherwise might have violated the antitrust laws. The rationale behind the Act was that this economic aid was necessary to preserve the number and diversity of editorial voices. Under the reasoning advanced by the *Herald* which, ironically, is a beneficiary of that legislation, the Act's requirement of independent editorial voices – the very justification for the economic benefits conferred by the Act – could be voided.

[124] Moreover, where a serious "chilling" burden has in the past been shown from a statute designed to increase speech in an electoral context, the Court has been able to fashion remedies that remove the danger without invalidating the statute itself. See, *e.g. Farmer's Educ. & Coop. Union v. WDAY*, 360 U.S. 525 (1959) (licensee relieved from liability for defamation in broadcast by candidate under equal time provisions of Section 315 of the Communications Act).

D. The Media's Argument That Any Compelled Access Will Open The Floodgates Of Government Regulation Of Newspapers Has No More Validity Than Their "Chill" Arguments

The *Herald*, in addition to arguing "chill", raises the spectre of "total governmental control of the content of all newspapers"[125] if the Reply Statute is sustained. This familiar argument has been raised by both the newspaper and broadcast media every time the government attempts to adopt "reasonable rules and regulations which fall short of abridgment of the freedom of speech and press."[126] The courts have usually recognized this argument as premature, and even more speculative than the "chilling effect" arguments. They have assumed that if arbitrary and impermissible governmental intrusions ever do occur, the courts will be able to deal effectively with them.

Red Lion, for example, rejected the "total control" spectre. The Court there stated that by approving the personal attack rules it did not mean to "ratify every past and future decision by the FCC with regard to programming," and it indicated the types of restrictions on broadcaster speech which would be repugnant to the First Amendment and would be struck down.[127]

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[125] *Herald* Br. at 32.

[126] *Red Lion, supra*, 395 U.S. at 382. See, *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913).

[127] 395 U.S. at 396. This Court, and the lower federal courts have consistently rejected this argument, as it has been raised by broadcasters, whenever the government takes steps to increase the diversity of speech in that medium. *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (elimination of network's "option time"); *Banzhaf v. F.C.C.*, 405 F.2d 1082 (D.C. Cir. 1969) (requiring cigarette advertising counter-messages); *National Associ-*

Similarly, in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), this Court again rejected the "camel's nose in the tent" argument in connection with newspapers. It there upheld a local ordinance barring reference to sex in help-wanted advertising columns, finding that it was not an unconstitutional abridgment of a newspaper's absolute discretion. Rebutting the charge that it was sanctioning wholesale government dictation of the form and substance of newspapers, the Court emphasized that its decision did not "authorize any restriction whatsoever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors."[128]

The media's continuous and excessive use of the argument that the next incidental restriction will wipe out the First Amendment and the free press in fact creates its own dangers. As the former head of CBS News has stated in arguing for retention of the fairness doctrine and criticizing the *Herald* in this case for its intransigent refusal to publish Tornillo's reply:

> I don't know which alarms me more—prosecutors and jurists flooding the courts ~~with~~ and subpoenaed reporters and contempt citations or newsmen and

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ation of Theatre Owners v. F.C.C., 420 F.2d 194 (D.C. Cir. 1969) (program type restrictions on subscription television); *Mt. Mansfield Television, Inc. v. F.C.C.*, 442 F.2d 470 (2d Cir. 1971) ("prime time access" rule, see *supra*, note 114).

[128] 413 U.S. at 391. In the instant case as well as in *Branzburg*, the state statute at issue directly, by its terms, "involves no restraint on what newspapers may publish", in the first instance, 408 U.S. at 681. It provides solely that a political candidate has a limited right of reply in the newspaper's own columns to, in effect, a personal attack.

publishers crying 'First Amendment' every time they are challenged.[129]

By "crying wolf" every time any limited attempt is made to diversify the sources of speech, the media themselves denigrate the value of the First Amendment.[130]

In sum, this Court should adhere to the principle that where competing First Amendment interests clash, simplistic arguments about the possibility of extreme governmental interference with the media are off-base. Rather, "[t]he balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions."[131]

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[129] "Media Are Scored By Fred Friendly"/"He Finds Excessive Use of First Amendment Slogan," *New York Times*, January 12, 1974.

[130] One of the chief ironies of the automatic First Amendment cloak of journalistic freedom that the media wrap about themselves each time there is an attempt to diversify speech is that as soon as the challenge to their absolute discretion to exclude viewpoints is passed, they return to business as usual, avoiding exercise of the journalistic freedom they have so recently defended by tailoring programming so as not to offend their advertisers. Senator Frank Moss, in a recent speech to broadcasters, noted the latter phenomenon in several deleted segments of network programs concerning medical insurance and malpractice that offended the AMA, and stated:

> "When you justly express fear of government encroachment on the freedom of the broadcaster to resist government-sponsored propaganda in any form of programming, I'm with you, and the American public is with you. But when you allow yourselves, with a rather exaggerated sense of deference to your advertisers for the simple human wish to avoid controversy, to shield the American public from a hard look at the realities of our problems and institutions, then you have become the censors and you are violating our First Amendment rights – the right of access."

_ *Broadcasting*, February 25, 1974, p. 29.

[131] *Branzburg v. Hayes*, *supra*, 408 U.S. at 710 (Justice Powell, concurring).

IV.

THE WELL ESTABLISHED PRINCIPLES OF JUDICIAL DEFERENCE TO LEGISLATIVE JUDGMENTS AND FEDERALISM REQUIRE THAT THE COURT PERMIT LEGISLATURES MAXIMUM MANEUVERABILITY FOR RESOLUTION OF THE COMPETING FIRST AMENDMENT POLICIES AT ISSUE IN THIS CASE. THAT COURSE WOULD PERMIT THE WIDEST POSSIBLE BREATHING SPACE FOR FIRST AMENDMENT VALUES.

The sweeping principles urged upon this Court by the media would wrap legislative attempts to assure an informed electorate—the core purpose of the First Amendment—in a "constitutional strait-jacket."[132] This Court has wisely eschewed such a course in areas where judicial deference to legislative judgments reconciling competing interests and judicial deference to "[o]ur Federalism"[133] is warranted.

A. The Legislature May Validly Determine That There is a Legitimate First Amendment Interest In Publication of Certain Information.

In *Lewis Publishing Co. v. Morgan*[134] this Court turned aside a First Amendment attack on a statute requiring disclosure of certain information in order to qualify for second class mail privileges. In *Lewis* the Court was engaged in what today would be referred to as "balancing": Is the government's police power interest adequate to overcome the statute's incidential infringement on First Amendment rights? But in the instant case, the Court need not balance a police power interest

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[132] *CBS v. DNC, supra,* 412 U.S. at 101.

[133] *Younger v. Harris,* 401 U.S. 37, 44 (1971).

[134] 229 U.S. 288 (1913), discussed *supra* at 27-28.

against an incidental or direct infringement of First Amendment rights. Rather, the problem is how to reconcile competing First Amendment interests. The Florida legislature chose the Reply Statute to reconcile these interests in favor of the right of the electorate to be informed. Appellant cannot simply state that it is "censorship" to require it to print anything it does not want to print and thereby nullify a considered legislative judgment which seeks to reconcile competing First Amendment interests. If Congress' interest in maintaining the integrity of the postal services was held by this Court to be sufficiently strong to offset the publishers' interest in refusing to print certain information, it follows *a fortiori* that the Reply Statute which requires the publication of certain materials in order to vindicate the First Amendment interest in an informed electorate is not, as Appellant would have it, invalid.[135]

Many state and local statutes also require that (a) certain materials appearing in newspapers and other publications be clearly identified generally as advertisements, (b) paid political advertisements be specifically so denominated, and/or (c) information regarding sponsorship of paid political advertisements also be provided. A catalogue of such statutes already is a part of the record

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[135] Indeed, *Lewis* itself could be viewed as in part based on the public's First Amendment right to know. As the Court stated in *Lewis*, the interest of Congress in enacting the disclosure requirement was "to secure to the public in 'the dissemination of knowledge of current events' by means of newspaper, the names not only of the apparent, but of what might prove to be the real and substantial owners of the publications, and to enable the public to know whether matter which was published was what it purported to be or was in substance a paid advertisement." 229 U.S. at 315-16.

before this Court,[136] and need not be repeated here. The *Herald's* contention that any form of compulsory publication of informational matter is censorship[137] would likewise invalidate these statutes. Yet each reflects a legislative judgment of how the clash of conflicting First Amendment values should be resolved.

Many states and localities also impose newspaper publication requirements in connection with a wide array of legal transactions, such as probate, property condemnation, licensing for alcoholic beverages, the sales of certain property, and escheat. These requirements recognize the critical role of newspapers as disseminators of information and as journals of public record.[138] These statutes are normally framed in terms of requiring the parties to the transaction to publish. But it would seem anomalous if a state could impose such a requirement on the parties to the transaction but could not compel newspapers of general circulation to carry such notices.[139] Certainly a discriminatory refusal to publish such notices, such as a newspaper's refusal on racial grounds to carry death notices–a legal prerequisite to probate in many states–could be legislatively barred.[140]

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[136] See Appendix to Brief of Appellee Tornillo.

[137] *Herald* Brief at 10-20.

[138] Indeed, in proceedings before the Federal Communications Commission, the National Newspaper Association opposed a proposed rule that replaced with an on the air announcement the requirement that a broadcast licensee publish notice that its license renewal application was pending. The NNA argued that broadcast announcements were insufficient to inform the public of pending license applications. *Renewal of Broadcast Licenses,* 44 F.C.C.2d 405, 418-20.

[139] But see *Mack v. Costello,* 32 S.D. 511, 143 N.W. 950 (1913), where a newspaper defendant's refusal to carry plaintiff's ad, a notice required by law, was sustained. However, there was no statute requiring the newspaper to carry the notice.

[140] *Cf. Pittsburgh Press Co. v. Pittsburgh Committee on Human Relations,* 413 U.S. 376 (1973).

B. Legislatures Should Be Accorded Maneuverability In Making Judgments Designed to Further First Amendment Values, And Their Decisions Should Be Accorded Broad Deference.

The statute under attack here is part of a comprehensive scheme regulating elections. As early as 1885, the Florida constitution commanded that state's legislature "to pass laws 'regulating elections and prohibiting under adequate penalties all undue influence thereof from power, bribery, tumult or other improper practices' and to 'enact such laws as will preserve the purity of the ballot given under this Constitution.' "[141] By 1909, Florida had enacted a comprehensive corrupt practices act to deal with primary elections. The statute in question was enacted four years later, "not to punish, coerce or censor the press but rather as a part of a centuries old legislative task of *maintaining conditions conducive to free and fair elections.*"[142]

That the government has a special interest in maintaining fair elections is beyond question. As discussed above, this special interest has been manifest at both the state and national level.[143] The electoral process, which is the bedrock of democracy, presumes that the First Amendment goal of an informed electorate has been achieved. But in the instant case, this Court is faced with a legislative judgment that, in a particular electoral situation, there is a confrontation between First Amendment

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[141] A. 18.

[142] A. 19. Emphasis in original.

[143] *Supra*, at 20-22.

principles that normally should operate in harmony. Where these interests clash, the task of reconciling them is necessarily a sensitive one, touching core values of a free and democratic society. It is, in every sense, a "legislative task."[144] The Florida legislature discharged that task by concluding that the unrestricted protection of the private rights of newspapers would not achieve the broad public purpose undergirding the First Amendment.

In areas where great public values intersect, and where a legislature has attempted to deal with a problem by a comprehensive statutory scheme, this Court will accord broad deference to legislative judgments.[145] Thus, the Florida legislature's attempt to resolve the competing mandates and claims of the First Amendment is entitled to be given great weight. The *Herald* dismisses with one sentence the notion that legislatures may act to safeguard public First Amendment interests: "Whether governmental compulsion is by court decree or by statute is constitutionally irrelevant."[146] This Court should not sanction such a limitation on legislative manueverability in so sensitive an area and the Appellant has advanced no sound reason to do so.[147]

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[144] A. 18.

[145] *Heart of Alabama Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Southern Railway Co. v. United States*, 222 U.S. 20 (1911); *Crossman v. Lurman*, 192 U.S. 189 (1904); *Mintz v. Baldwin*, 289 U.S. 346 (1933).

[146] *Herald* Br. at 10. Footnotes omitted. As previously noted, every case cited by the *Herald* in the area of newspaper publication requirements involved a request for a court-declared constitutionally mandated right of access to newspapers, rather than a legislative attempt to resolve competing First Amendment interests or enhance First Amendment values. See *supra* at 24-28.

[147] Allowing legislative manueverability is not only consistent with *CBS v. DNC* and *Red Lion;* it is mandated by them. In those cases, Congress made one determination as to how to reconcile competing First Amendment interests. The Florida legislature had

C. Proper Respect for the Role of the States In The Federal System Dictates Judicial Restraint in Review of State Statutes Reconciling First Amendment Values

In the instant proceeding, the fundamental precept that a court will give great deference to legislative judgments harmonizes with another great constitutional principle: the importance of Federalism.[148] Federal rights must be vindicated in a way that has a minimal impact on the legitimate activities of the states.[149]

In the instant case, Florida made a legitimate legislative effort to vindicate the First Amendment fundamental purpose of assuring an informed electorate. This does not, of course, preclude review by this Court. The Court can and must review state legislative acts to assure that important constitutional principles are not ignored.[150] Where, as in *Mills v. Alabama*, *supra*, a legislature cannot show that it is reasonably attempting to reconcile competing First Amendment values, this Court can properly invalidate a statute regulating newspapers.

By contrast, a candidate reply statute does not bar newspaper editors from speaking on electoral issues or from endorsing candidates at any time. A reply statute could be designed to deal narrowly with the problem the legislature sought to address in *Mills*.[151] For example, such a statute might merely provide that no editorial charges could be made within 24 hours of an election without notifying the candidate and providing opportunity for reply. While the Florida Reply

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made another. That different media are involved is irrelevant. What is important is that the legislature has rendered a judgment as to how to resolve the competing interests, and it is entitled to great weight.

[148] *Younger v. Harris*, *supra*, 401 U.S. at 44.

[149] *Id.*; *Branzburg v. Hayes*, *supra*, 408 U.S. 665 at 706; *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60 (1973); *Miller v. California*, 413 U.S. 15, 30 (1973).

[150] See 28 U.S.C. §1257.

[151] See *supra*, note 68.

Statute is not framed in precisely these terms, its purpose is also to prevent political charges from being made without affording the public an opportunity to hear contrasting views. But under the sweeping rationale advocated by the *Herald*, no state reply statute to remedy the *Mills* or similar electoral problems, no matter how narrowly drawn and well adapted to the First Amendment purpose of preserving the public's interest in electoral information, could withstand a First Amendment challenge.

This Court, which has been continually sensitive to the strength of federal principles, must be particularly wary of adopting an absolute prohibition on state efforts to implement sensitive and conflicting First Amendment values. Federalism is not only a matter of "comity" to states.[152] It also reflects a commitment to the notion that diverse approaches to problems are likely to produce better solutions, just as the First Amendment assumes that there is a greater likelihood that truth will emerge out of a multitude of tongues. Precipitous action by this Court now to prevent experimentation by state legislatures is totally unwarranted.

D. The Court Should Exercise Great Restraint In Light Of The Important Constitutional Principles Converging In This Case

The statute under challenge presents this Court with the convergence of three great interests: the deference to be accorded (a) *a legislative act*, (b) *when adopted by a state*, (c) that attempts to reconcile competing considerations in assuring *the free flow of information to the public*. Whether taken individually or considered

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[152] *Younger v. Harris, supra*, 401 U.S. at 44.

together, the presence of these three interests in this case mandate that any action which this Court takes should be extremely limited.

This ruling will have a critical impact on the ability of both the states and the federal government to assure that their electorates are informed. Thus, any action by this Court must leave legislatures with wide discretion to attempt to resolve and balance the competing interests inherent in the regulation of 50 different state electoral schemes as well as the national electoral process.

There is no line of cases directly presenting the Court with all three of these factors in the same context. But in one line of cases that raised closely related issues, this Court has wisely chosen to leave expansive discretion to legislatures to fill in the interstices of the constitutional framework.

In the legislative apportionment cases, the interests both of federalism and deference to legislative judgment were involved and closely intertwined. And, although no speech issues were directly involved in the apportionment cases, the states' authority to preserve the integrity of their electoral processes—an issue closely related to the speech issue here—was also involved. The evolution of this Court's involvement in the apportionment issue illustrates the manner in which this Court has proceeded where so many sensitive constitutional issues are involved.

Initially, this Court declined even to adjudicate the issue of state legislative apportionment.[153] Then in *Baker v. Carr*,[154] the Court held that the issue was justiciable. But even as it cleared away the barrier to justiciability, it went no further than to declare its adherence to the

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[153] *Colegrove v. Green*, 328 U.S. 549 (1946).

[154] 369 U.S. 186 (1962).

broad constitutional principle of equal protection. When in subsequent cases it clarified the meaning of equal protection in this context by declaring that state legislative districts must reflect population,[155] it left state legislatures broad discretion to consider a variety of criteria in diverse ways in making "an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable."[156] Although various tests evolved for ascertaining whether this standard was met,[157] in applying these tests the courts gave deference to the state's interest in preserving the integrity of political subdivisions,[158] in assuring at least some representation for political subdivisions,[159] in using fractional or multi-member apportionment schemes,[160] and even in deviating substantially from proportional representation[161] so long as the basic equal protection guarantee of proportional representation was not "submerged."[162]

Amicus submits that here, because similarly critical issues of deference, federalism, and substantive rights are involved, similar care and caution is warranted. While the Constitution sets the basic limiting framework of values that must be considered in framing statutes applicable to

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[155] *Reynolds v. Sims*, 377 U.S. 533 (1964).

[156] *Id.* at 577.

[157] Note, "Reapportionment," 79 *Harv. L. Rev.* 1228, 1250 (1966).

[158] See *Abate v. Mundt*, 403 U.S. 182 (1971).

[159] See *Schaefer v. Thomson*, 240 F. Supp. 247 (D. Wyo. 1964).

[160] *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

[161] *Abate v. Mundt, supra.*

[162] *Reynolds v. Sims, supra*, 377 U.S. at 581.

the media, just as in the case of apportionment, there must similarly be a wide area of legislative manueverability for the states[163] and Congress to reconcile the electorate's right to be informed on public issues with the power of the press to exclude such information. Amicus submits that this constellation of principles compels affirmance of the Reply Statute, or at the least a decision that leaves maximum room for legislative flexibility.

Adoption of the broad holding urged by the *Herald* and its *amici* would, for example, prohibit a state from determining that the public's interest in information on electoral matters required that, as part of a statewide voter registration effort, sending voting registrars to counter underregistration,[164] would be effective only if notice of their presence were carried in local newspapers of general circulation.

Similarly, a state might determine that newspapers must sell space to those who wish to reproduce ballot propositions in notice form, as is presently undertaken in many states by the League of Women Voters.

Finally, outside the electoral area, a state legislature might determine that, in order to provide information

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[163] Conditions from state to state vary widely. States might, for example, want to consider such factors as the extent to which major metropolitan areas have competing local newspapers (such as in New York), whether newspapers from major cities inside the state (such as in Iowa) or from outside the state (such as in New Jersey) compete with local newspapers, the extent to which local newspapers or newspapers competing with them accept paid political advertisements and the nature of the state's respective electoral process, e.g. whether there are primary elections for local and/or statewide offices.

[164] *Cf.* the Federal Voting Rights Act of 1965, upheld in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

about matters of urgent public health and safety, notices concerning drugs or other products found to be imminently dangerous should be widely disseminated. The legislature might determine that a statute requiring newspapers in the area the drug or other product was being sold to publish such notices was a valid method of advancing this legitimate governmental purpose.

In all of the above cases, a detailed examination of the context of the legislation, its goals and purposes, and the manner of the legislature's resolution of the competing interests, would be called for. If the statute provided for payment for the particular notice, there could be no question of financial burden, or "tax" or "taking." In addition, all of the above examples are content-neutral–that is, they do not depend on whether or not the newspaper itself says anything on the subject of the material to be printed. Thus, there cannot be any even speculative chilling effect on the media's own discussion of issues from such statutes.

These and other types of specific questions are worth scrutiny each time such a statute is examined within the overall constitutional framework. But because such statutes deal with attempts to maximize First Amendment values, as well as other governmental interests such as the integrity of the electoral process and public health and safety, they should not be held *per se* invalid. As the Court recently stated in dealing with difficult constitutional questions involving state election statutes, there is no "litmus paper test" in such areas, and "hard judgments" must be made in each case.[165]

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[165] *Storer v. Brown*, No. 72-812 (March 26, 1974) Slip Op. at 5.

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the decision of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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April 1, 1974

FILED
APR 12 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of
KNIGHT NEWSPAPERS, INC.,
Appellant,

v.

PAT L. TORNILLO, JR.,
Appellee.

On Appeal from the Supreme Court of Florida

REPLY BRIEF FOR APPELLANT THE MIAMI HERALD PUBLISHING COMPANY

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MIAMI REVIEW — 371-4653 — 377-3721

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REPLY BRIEF FOR APPELLANT THE MIAMI HERALD PUBLISHING COMPANY

I. INTRODUCTION.

Appellee Tornillo has attempted to support the decision of the Florida Supreme Court on the grounds that the Florida compulsory publication statute is a limited incursion upon the editorial discretion of newspapers which serves the objectives and enhances the values of the First Amendment. A careful reading of Tornillo's brief, however, shows that he seeks a fundamental revision of the First Amendment to permit the government to tell the press what to print.

Tornillo seeks to persuade this Court that a major revolution in First Amendment theory is demanded by painting a stark picture of a monolithic, monopolistic media, armed by *New York Times v. Sullivan* with a license to libel, relentlessly suppressing public debate and mercilessly hounding helpless politicians. Tornillo's own plight is cited as a typical example of unfairness of the press. To correct this supposedly grim situation, Tornillo proposes that the government begin to regulate the fairness and balance of newspaper coverage of public issues.

Tornillo has failed to justify the profound and fundamental revision of the First Amendment required by the Florida compulsory publication statute. Tornillo's self-portrayal as a lonely voice isolated in the political wilderness by a hostile press is simply untrue. *The Herald* editorially opposed Tornillo's election, but covered his campaign in news articles and published his paid political advertisements almost daily. Three other newspapers editorially supported Tornillo's candidacy. As with any political candidate in Dade County, Tornillo has enjoyed the benefit of extensive press coverage, and has had ac-

cess to a variety of modes of communication to urge his views on the citizens of Dade County.

Tornillo has not demonstrated that the press is so powerful and unfair that the historic constitutional ban upon governmental regulation of the content of newspapers should be abandoned. The issue in this case is not whether the press ought to be fair, but whether it ought to be free. Every responsible newspaper recognizes a professional obligation to provide reasonable coverage of all significant points of view, and strives for objective reporting of the news. The basic question in this case is whether the government has the power to tell newspapers what to print. The First Amendment compels a negative answer to that question.

There is no justification for scrapping our system of free and independent expression in search of a utopia where the government seeks to guarantee that every argument is fair and that every voice has equal space. Any effort to legislate "fairness" in newspapers will inevitably lead to pervasive governmental control. Such a result is neither warranted by the Constitution nor desirable from any rational interest in free expression.

II. TORNILLO HAS NOT REBUTTED THE HERALD'S SHOWING THAT THE FLORIDA COMPULSORY PUBLICATION STATUTE VIOLATES THE FIRST AMENDMENT.

A. The statute is in fundamental conflict with the First Amendment.

Tornillo attempts to persuade the Court that the Florida statute should be upheld because it has a worthy objective—assuring "full and fair discussion" of public issues—and there is no direct precedent for striking down the statute.[1] The Court need not approach this case in the vacuum postulated by Tornillo. Familiar First Amendment principles provide ample guidance for testing the Florida statute against the Constitution. It is clear from the numerous authorities cited in *The Herald's* brief that the Florida statute conflicts fundamentally with the First Amendment.

Tornillo asks the Court to disregard all prior cases dealing with compulsory access to the press on the ground that those cases involved attempts to have courts fashion a First Amendment right of access. A state statute, it is claimed, stands somehow on constitutionally distinguishable grounds. *The Herald's* brief recognized that cases involving statutes are obviously different from those which do not.[2] However, the First Amendment forbids the government to dictate the contents of a newspaper. As stated in

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[1]Brief for Appellee at 5 ff.

[2]Brief for Appellant at 18.

The Herald's brief, "Whether governmental compulsion is by court decree, or by statute, is constitutionally irrelevant."[3]

All courts except the Florida Supreme Court which have considered attempts to compel access to the press have rejected such claims.[4] The primary rationale of those cases has been that compulsory access violates the First Amendment rights of the publishers whose presses are sought to be commandeered. Tornillo has asserted no basis for concluding that legislatures are more free to violate the First Amendment than courts.

The issue in this case is not a technical one of state action. The issue is whether the government can tell newspapers what to print. Professor Emerson has pinpointed the reason that the Florida statute is unconstitutional:

> "It means that the government can tell the newspapers that the newspapers can be forced to print material they don't want to print. This is the very opposite of freedom of the press."[5]

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[3]Brief for Appellant at 18, footnotes omitted.

[4]*E.g., Chicago Joint Board, Amal. Cloth. Workers v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), *cert. den.*, 402 U.S. 973 (1971); *Opinion of the Justices*, 298 N.E.2d 829 (Mass. 1973); *cf. Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973).

[5]T. Emerson, quoted in Gartner, "A New Cloud for the First Amendment," *The Wall Street Journal*, July 30, 1973, also quoted by R. Traynor, "Speech Impediment and Hurricane Flo," reprinted in 120 *Cong. Rec.* S 1105 (February 4, 1974). Professor Emerson has thus recognized that his previous speculation that "reply" legislation might be constitutionally permissible cannot be reconciled with his views that the press must be free of governmental regulation. *Compare* Emerson, *The System of Freedom of Expression*, 667-668 and 670-671 (1970).

Governmental intrusion on a newspaper's editorial discretion is in basic conflict with our First Amendment traditions. The authors of the First Amendment are unlikely to have intended it to allow the government to require Peter Zenger to give reply space to the British. Benjamin Franklin believed "that his newspaper was not a stagecoach with seats for everyone . . ."[6]

The First Amendment assures public expression of opinion, but not by governmental regulation of the fairness or balance of the content of the press.[7] The Florida statute attempts the "authoritative selection" of the content of newspapers which Judge Learned Hand found forbidden by the First Amendment.[8] As Mr. Justice Stewart has expressed, it is "a clear command" of the First Amendment "that Government must never be allowed to

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[6] Mott, *American Journalism* 55 (1962) quoted in *Columbia Broadcasting System v. Democratic National Committee, supra* at 152 (Douglas, J., concurring).

[7] "'[P]rotection of the public from interested and improperly influenced news coverage' is not a compelling governmental interest . . . it may in fact be an interest with which the government may not constitutionally concern itself at all. The very essence of a free press is that there is room in our country for publication by every segment of 'interested' opinion, and that out of the free comparison of opinions of different "interested" sides, citizens can make their own determination as to truth."

Lewis v. Baxley, Civ. No. 4182-N, 13 (M.D. Ala. Dec. 21, 1973) (three-judge court). This case held unconstitutional a state statute which sought to protect citizens against improperly influenced newsmen by requiring financial disclosure from newsmen prior to admitting them to state legislature galleries.

[8] *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964), *quoting United States v. Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943).

lay its heavy editorial hand on any newspaper in this country."[9]

The First Amendment presupposes an intelligent citizenry, not courts or governmental agencies, will act as the ultimate arbiters of the quality of the content of the press.

> "In the final analysis, the readers are the ultimate 'controllers' no matter what excesses are indulged in by even a flamboyant and venal press; that it often takes a long time for these influences to bear fruit is inherent in our system."[10]

B. The statute is not required to assure full public debate.

The Florida Supreme Court held that the Florida statute promotes the objectives of the First Amendment. Tornillo seeks to sustain that holding by painting a distressing self-portrait of a politician without a stump. Tornillo asserts that this case "illustrate[s] the silencing of debate" and "absent the Florida right of reply statute, Tornillo would be effectively muzzled in Dade County, Florida."[11] The true situation is admitted by Tornillo's self-characterization in his brief as an "outspoken advocate" who serves as a "citizen critic" of government.[12] Tor-

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[9] *Pittsburgh Press Co. v. Human Rela. Comm.*, 413 U.S. 376, 403-4 (Stewart, J., dissenting).

[10] *Id.* at 395 (Burger, C.J., dissenting).

[11] Brief of Appellee at 24, 29.

[12] Brief of Appellee at 24-25.

nillo fails to explain how he has fulfilled these roles while "effectively muzzled" by the press in Dade County.

The explanation is simple. Tornillo has enjoyed wide news coverage in Dade County and has been the subject of both favorable and unfavorable editorial commentary. During the campaign for the state legislature in the fall of 1972, Tornillo, together with all other candidates, received extensive coverage in the news columns of *The Herald.*[13] *The Herald* published political advertisements submitted and paid for by Tornillo almost daily during the month preceding the election.[14] *The Herald* editorially opposed Tornillo's candidacy. Miami's other major daily newspaper, *The Miami News,* endorsed Tornillo.[15] Two other newspapers also supported his candidacy.[16]

The press, Tornillo claims, have been armed by this Court with a license to libel, and are eager to "attack

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[13]*The Miami Herald,* July 21, 1972 at 2B; August 30 at 5D; September 10 at 21-O; September 23 at 3D; September 26 at 20A; September 29 at 11C; October 3 at 2B; October 4 at 15A and 1B.

[14]*The Miami Herald,* September 10, 1972 at 4B; September 10 at 32-O; September 11 at 29A; September 17 at 2E; September 21 at 30A; September 23 at 10A; September 24 at 7E; September 25 at 24A and 30C; September 26 at 21A; September 28 at 18A; September 29 at 8B; September 30 at 25A; October 1 at 14C; October 2 at 28A, 19B and 5D.

[15]*The Miami News,* August 24, 1972 at 31A; September 11 at 30A; October 2 at 30A.

[16]*The Miami Herald,* October 1, 1972 at 14C (Tornillo political advertisement announcing his endorsement by *The Miami News, The Miami Beach Sun-Reporter,* and *The North Dade Journal.)*

their prey as they will."[17] Absent compulsory access or rights to reply, we are told, public debate will be silenced.[18]

The spectre of worthwhile ideas shut off from the channels of communication by a monopolistic media dominating a monolithic marketplace of ideas is a fantasy unsupported by evidence and contradicted by common experience. For example, in Dade County, there are two major daily newspapers, four other daily newspapers, thirty-one weekly newspapers, six commercial TV stations, a community television station, and twenty radio stations.[19] In addition, a number of magazines are published in the County, together with various periodicals of limited circulation, including publications of private organizations such as unions. Nationally and regionally published newspapers, magazines, and other periodicals also circulate in the County. Political candidates also have access to billboards, pamphlets, handbills, bumper stickers, and public meetings.

In smaller cities and towns, of course, the channels of communication may be less extensive. However, the number of people to be reached is correspondingly fewer, so that the efficacy of direct communication, such as public speeches and handbills placed on every doorknob, is enhanced.[20]

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[17]Brief of Appellee at 29.

[18]Brief of Appellee at 24.

[19]*Dahne's News Media Directory for South Florida* at 1-10, 25-67, 131-137, 161-175 (Hollywood, Fla. 1972).

[20]*See Branzburg v. Hayes* 408 U.S. 665, 704-05 (1972); *Martin v. Struthers*, 319 U.S. 141, 146 (1942); *Schneider v. State*, 308 U.S. 147 (1939).

Tornillo's claims of muzzled public debate are therefore hollow.[21] Tornillo has proposed that the test of the validity of the compulsory publication statute should be whether the material for which publication is sought has been "suppressed and underrepresented".[22] Tornillo cannot meet his own test.

Even if Tornillo could cite a valid example of "suppression and underrepresentation", it could not justify upholding the Florida statute. The First Amendment guarantees each individual a right to say what he pleases, with carefully limited exceptions, but it does not guarantee him a mode of communication, an audience, or the financial means to secure either.

> "No society that ever existed has afforded equal access to the means of communication to all its members or groups. . . . In fact the effort to achieve such equality by government allocation, without any reliance upon laissez-faire factors, might jeopardize rather than better the system. . . . The history of the civil-rights movement, the peace movement, the black movement, and others in recent years indicates that minorities have found ways to be heard. . . . The problem of equality is a crucial one, but the remedy is betterment

[21] "[T]he candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate to the contrary." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274 (1971) (footnote omitted).

[22] Brief of Appellee at 48.

of the system, not abandonment. Again, the alternative would be worse."[23]

C. The effect of upholding the statute will be to suppress public debate.

In its brief, *The Herald* showed that in practical operation the Florida statute would have an effect directly opposite of that claimed for it — it would restrict, not enhance, public discussion.[24] Newspapers, Tornillo claims, are saying that if they are forced to play fair, they won't play at all. As discussed above, the issue in this case is not whether fairness is desirable, but whether governmental regulation designed to compel newspapers to be "fair" violates the First Amendment.

Tornillo claims the Florida statute will not prevent *The Herald* from saying anything it wishes.[25] That is true only if *The Herald* is willing to pay the heavy price which the statute exacts for printing criticism (whether in news stories, editorials, columns, advertisements, or elsewhere) of political candidates.[26] No matter how accurate the criticism, no matter how extensively the issues have al-

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[23]Emerson, *The System of Freedom of Expression*, *supra* at 727. *See Kovacs v. Cooper*, 336 U.S. 77, 102 (1948) (Black J., dissenting).

[24]Brief of Appellant at 29-32.

[25]Brief of Appellee at 5.

[26]Tornillo's assertions that the statute applies only to "editorial attacks" (Brief for Appellee at 39, 55) are directly contradicted by the terms of the statute and its interpretation by the Florida Supreme Court. 287 So.2d 86, Appendix 30. Although the precise meaning of the phrase "in its columns" is unclear, there is no basis for assuming that the statute applies only to editorial columns.

ready been covered, *The Herald* will be forced to provide space for a verbatim "reply". The greater its coverage of political campaigns, the greater the preemption of *The Herald's* columns for "replies."

Tornillo's counsel has admitted, "The paradox, therefore, is that a larger access is dependent upon censorship, a minimal censorship to be sure, but nonetheless censorship."[27] The reinterpretation of the First Amendment required to affirm the decision below would convert the press to a governmentally-supervised public utility, as Professor Barron has freely conceded.[28]

D. There is no state interest in fair elections sufficient to justify the statute's intrusion on the First Amendment.

Tornillo has attempted to disguise the Florida statute as permissible state regulation no different, constitutionally, than a host of other state statutes which regulate various aspects of newspaper publication. Such legislation, collected in Appellee's Appendix, is irrelevant to the issues in this case.[29]

The Herald has not contended that the First Amendment precludes governmental regulation of some aspects of newspaper publication. The press can be regulated

[27]Barron, *Freedom of the Press for Whom?* 288 (1973).

[28]*Id.* at 25, 308, 325; Barron, "Access to the Press," 80 *Harv. L. Rev.* 1641, 1666 (1967).

[29]The constitutionality of each such statute is assumed by Tornillo. At least two of the statutes cited by Tornillo, §§104.372 and 104.35, Fla. Stat., are now under constitutional attack in federal court. *Gore Newspapers Co., v. Florida*, Civ. No. 74-103 (S.D. Fla. filed April 4, 1974).

on commercial and economic matters, as any other business.[30] It is likewise fundamental that certain paramount state interests may override freedom of expression, such as protection from obscenity.[31] However, the Court has "underline[d] the narrowness of the recognized exceptions to the principle that the press may not be regulated by the Government."[32] The Florida statute fits no such narrow exception.

Tornillo's argument was answered by Judge Learned Hand in *United States v. Associated Press:*

> "[T]he mere fact that a person is engaged in publishing, does not exempt him from ordinary municipal law, *so long as he remains unfettered in his own selection of what to publish.*"[33]

Tornillo concedes that the Florida statute will place governmentally imposed constraints upon the content of newspapers.[34] It is impossible to reconcile such regulation with the "protection afforded to editorial judgment"[35] by the First Amendment. No valid state interest has been presented to bridge this constitutional chasm.

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[30] *E.g., Associated Press v. United States,* 326 U.S. 1 (1945).

[31] *E.g., Roth v. California,* 354 U.S. 476 (1957).

[32] *Pittsburgh Press Co. v. Human Rela. Comm., supra* at 382.

[33] 52 F.Supp. 362, 374 (S.D. N.Y. 1943) (emphasis added) *aff'd.,* 326 U.S. 1 (1945).

[34] Brief of Appellee at 46, 49.

[35] *Pittsburgh Press Co. v. Human Rela. Comm., supra* at 391.

E. The Newspaper Preservation Act is not relevant to this case and provides no constitutional support for the statute.

Tornillo's brief asserts that if the Newspaper Preservation Act[36] is constitutional, the Florida statute must also be constitutional, since both attempt to assure diversity of opinion.[37] Tornillo's attempted analogy cannot withstand analysis. The Newspaper Preservation Act was held in *Bay Guardian Co. v. Chronicle Pub. Co.* to be "a narrow exception to the anti-trust laws for newspapers in danger of failing" which was "designed to preserve independent editorial views."[38] As attempted in the *Bay Guardian* case, Tornillo has contrived a "phantom act." On the contrary, "the Act . . . does not confer any license to monopolize and indeed has a specific provision prohibiting 'predatory practices' (§1803(c))."[39]

Tornillo's unsupported assertion that *The Herald* has received "special immunity from the antitrust laws" from the Newspaper Preservation Act is untrue.[40] *The Herald's* agreement with *The Miami News* was made before the Act was adopted, and received advance approval of the Justice Department. The publisher of *The Herald* editorially opposed enactment of the Newspaper Preserva-

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[36]15 U.S.C. §§1801-04.

[37]*E.g.*, Brief of Appellee at 7-8.

[38]*Bay Guardian Company v. Chronicle Publishing Company*, 344 F.Supp. 1155, 1157-58 (N.D. Cal. 1972).

[39]*Id.* at 1158.

[40]Brief of Appellee at 6.

tion Act. The joint operating agreement between *The Herald* and *The Miami News* has not undermined the editorial independence of either newspaper, since *The Herald's* joint operating partner, *The Miami News*, endorsed Tornillo's candidacy both in the primary and general elections.[41]

Thus nothing in the Newspaper Preservation Act undercuts the argument made in *The Herald's* brief that if illegal monopolization exists in the press, the antitrust laws are adequate to deal with such situations. Alleged fears of concentration and monopolization cannot justify the Florida statute's intrusion upon freedom of the press.

F. The statute's vagueness will subject newspapers to uncertainty, and its interpretation will require a substantial volume of litigation.

Tornillo's brief does not dispute the vagueness of the terms of the Florida compulsory publication statute. Tornillo seeks to minimize the implication of this fact by arguing that the statute's terms can be clarified in subsequent litigation, and that the statute's terms are no more vague than the personal attack rules of the Federal Communications Commission. Both arguments demonstrate the validity of *The Herald's* contention that the statute is excessively vague and will have a chilling effect upon freedom of expression.

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[41] *See* fn. 15, *supra*.

Tornillo argues that the Florida statute clearly applies to the facts of this case and that it is somehow improper to raise questions as to the scope of the statute in other cases. Tornillo ignores the fact that *The Herald* has questioned the constitutionality of the statute *on its face.*

Tornillo does not deny that the statute's terms are vague and ambiguous, and that clarification of the statute's terms will require extensive litigation.[42] Tornillo further concedes that the statute will have a chilling effect upon free expression.[43] Even if courts were free to rewrite such vague statutes in the guise of defining their terms,[44] Tornillo's concessions establish conclusively that the statute's vagueness will subject newspapers circulated in Florida to extensive litigation, which will necessarily have an unconstitutional chilling effect upon coverage of political campaigns.[45]

Tornillo's attempted analogy to the terminology used in Florida's "retraction" statute (§770.02, Fla. Stat.) is likewise faulty, for two reasons. First, due to the substantial differences in language between the two statutes, not one of the six categories of questions raised by the compulsory publication statute are raised by the retraction statute.[46] Second, the retraction statute is an optional pro-

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[42]Brief of Appellee at 55-58.

[43]Brief of Appellee at 60.

[44]Such judicial rewriting is impermissible. *E.g., United States v. Robel,* 389 U.S. 258, 262 (1967); *Aptheker v. Secretary of State,* 373 U.S. 500, 516 (1964).

[45]*E.g., New York Times Co. v. Sullivan, supra* at 279.

[46]See Brief of Appellant at 34-35; Brief of Appellee at 55-57.

tection of newspapers from punitive damages, not a requirement to publish without discretion. A newspaper unsure of the availability of the retraction statute may choose to publish a retraction in the hope that the statute is available to mitigate damages. If a newspaper guesses wrong about the applicability of the compulsory publication statute, however, it faces criminal prosecution and civil liability for damages and injunctions.

Tornillo's reliance upon the Court's rejection of vagueness arguments in *Red Lion* is unsound. In *Red Lion*, the Court specifically relied upon the ability of the Federal Communications Commission to interpret its regulations.[47] No such regulatory interpretation is available to implement the Florida statute. Professor Barron predicts that statutes regulating access to the press will require extensive governmental supervision, but rather than foreseeing the rise of regulatory agencies for newspapers, he predicts the burden will be borne by the judiciary.[48]

III. TORNILLO CONCEDES THE COURT HAS JURISDICTION OF THIS CASE.

Tornillo agrees with *The Herald* that the decision below was final for purposes of 28 U.S.C. §1257. In a recent unanimous opinion which reaffirmed many of the

[47]*Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 392 (1969).

[48]Barron, *Freedom of the Press for Whom?* *supra* at 54, 65.

principal cases cited by *The Herald* in its initial brief,[49] the Court held in *North Dakota Pharmacy Bd. v. Snyder's Stores* that Section 1257 was intended to "avoid piecemeal review," and that requisite finality was present despite the state court's remand for hearings "sans the constitutional issue."[50] An almost identical situation exists here, made even more compelling by the importance of the constitutional rights at issue and the pressing need for their immediate resolution.

[49] *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945); *Mills v. Alabama*, 384 U.S. 214 (1966); *Hudson Distributors, Inc. v. Eli Lilly & Co.*, 377 U.S. 386 (1964); *Local No. 438 Construction & General Laborers' Union, AFL-CIO v. Curry*, 371 U.S. 542 (1963); *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963); *Brady v. Maryland*, 373 U.S. 83 (1963).

[50] 38 L.Ed.2d 379 (1973).

IV. CONCLUSION

For the reasons above, and those stated in *The Herald's* brief and in the briefs of *amici curiae* in support of *The Herald*, the judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY, A DIVISION OF KNIGHT NEWSPAPERS, INC., *Appellant*,

v.

PAT L. TORNILLO, JR., *Appellee*.

On Appeal from the Supreme Court of Florida

BRIEF OF AMICI CURIAE, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS AND THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI IN SUPPORT OF APPELLANT

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February 28, 1974

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY, A DIVISION OF KNIGHT NEWSPAPERS, INC., *Appellant*,

v.

PAT L. TORNILLO, JR., *Appellee*.

On Appeal from the Supreme Court of Florida

BRIEF OF AMICI CURIAE, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS AND THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI IN SUPPORT OF APPELLANT

The American Society of Newspaper Editors and the Society of Professional Journalists, Sigma Delta Chi, submit this brief as amici curiae in support of Appellant's Appeal from the Judgment of the Florida Supreme Court entered on October 10, 1973, which held that Section 104.38 of the Florida Statues does not violate the First Amendment of the United States Constitution. Written consents of all parties to the filing of this brief have been given pursuant to Supreme Court Rule 42(1), and are annexed hereto.

STATEMENT OF THE CASE

Amici curiae adopt Appellant's statement of the case.

QUESTIONS PRESENTED FOR REVIEW

1. Does the First Amendment of the United States Constitution permit a state to impose direct controls upon a newspaper's editorial judgment by the enactment of a statute which requires, under pain of criminal sanction, a newspaper to publish a reply as a condition to publishing material critical of political candidates?

INTEREST OF AMICI CURIAE

The American Society of Newspaper Editors is a nationwide, professional organization of more than 800 persons holding positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded more than 50 years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, preamble), and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

The Society of Professional Journalists, Sigma Delta Chi, is the society of students and practitioners of journalism. With more than 100 student chapters and more than 100 professional chapters, its 21,000 members include the most distinguished journalists in the United States.

In their professional capacity, members of ASNE and The Society of Professional Journalists, Sigma Delta Chi, are seriously concerned that the Florida Supreme Court's decision, if upheld, will have a stifling and suppressive effect on news reporting in American newspapers.

ARGUMENT

The constitutional vice of the Florida compulsory publication statute is that it, for the first time, permits a governmental entity to impose direct controls upon a newspaper's editorial content and judgment. At the heart of editorial policy making and journalistic integrity is the decision of what is and what is not to be published. As this Court recently emphasized: "For better or for worse, editing is what editors are for; and editing is selection and choice of material."[1] The Florida compulsory reply statute directly and nakedly deprives newspapers and editors of editorial freedom of choice, and substitutes therefor the administrative fiat of the government as censor.[2]

Significantly, the targets of the governmental controls imposed by Florida upon editorial freedom and judgment are stories, commentary and criticisms of the operation of government itself, and criticism of candidates for public office. This is the area in which governmental intervention is most dangerous and can be least tolerated. Whatever else the First Amendment may have been intended to do, it was most assuredly designed to protect, and indeed to further, the unfettered performance by the press of its vital constitutional role as a critic of governmental affairs and the process of government itself:

> "The predominant purpose of the . . . [First Amendment] was to preserve an un-

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[1] *Columbia Broadcasting System, Inc. v. Democratic National Committee*, ____ U.S. ____; 36 L.Ed.2d 772 (1973).

[2] *Columbia Broadcasting System, Inc., supra*, 36 L.Ed. at 811-11 (concurring opinion of Justice Douglas).

> trammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppresion or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1935).

The concept that governmental regulation of the Press will enhance First Amendment values is illusory and erroneous. Every court which has considered the matter (other than the Florida State Supreme Court in its decision here at issue) has properly and decisively rejected the theory that the First Amendment condones or allows government to place itself in a position as an arbiter of what should or should not be printed. See, *e.g.*, *Chicago Joint Board, Amal. Clothing Workers v. Chicago Tribune*, 435 F.2d 470 (7th Cir. 1970) cert. den. 402 U.S. 973 (1971). *Avins v. Rutgers, State University of New Jersey*, 385 F.2d 151 (3d Cir. 1967), *Brown v. Murphy*, 355 F.Supp. 416 (SDNY 1973); *Yablonski v. UMW*, 305 F.Supp. 868 (D.D.C. 1969).

It is ironic that the Florida compulsory reply statute was upheld by the Florida Supreme Court on the ground that the intent behind it was to increase public discussion and debate, when the statute may well have precisely the opposite effect. The extent to which the statute, if upheld, will allow governmental regulation of the formulation of editorial policy, and curtial criticsm by newspapers of

candidates for public office, cannot be minimized. Enforcement of the statute will create the following paradoxical dilemma: either newspapers will cease acting as critics of candidates for public office, or, if they continue to do so, will inevitably bring governmental dictat into the editorial room to an unprecedented and constitutionally impermissible extent.

The deterrent effect of the statute is clear. In terms of cost alone the statute's requirement that the newspaper provide "free space" in an equal amount for replies will, in and of itself, deter the publication of critical commentary. Entirely apart from cost considerations, the statute even if not unconstitutionally vague,[3] is susceptible to varying interpretations. The necessity of engaging in lengthy disputation (or, indeed, even in lengthy negotiations with potential repliers) will deter newspapers from opening the door to such difficulties through the publishing of articles critical of governmental candidates. This Court has quite properly recognized the all too human tendency of even the most courageous publishers to "make only statements which 'steer far wider of the unlawful zone.'"[4] This is precisely the type of chilling effect upon freedom of expression which this Court has repeatedly held to be improper.

But even if newspapers choose to risk the costs and difficulties which would result from implementation of

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[3] Appellant has urged that the Florida statute is unconstitutional on due process grounds for vagueness. Amici agree with this agreement and urge that it represents a valid ground in and of itself to strike down the statute.

[4] *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964).

the Florida statute, nevertheless, the result would be one far different than what was envisioned by the framers of the First Amendment. The experience of the Federal Communications Commission, in implementing its "Fairness Doctrine", makes clear that the type of compulsory reply statute at issue here thrusts the government and, in particular, the courts, deeply into the heart of the editorial process. Inevitably, differences of opinion as to the meaning of the general and ambiguous phrases used in the statute will foment litigation. The state courts will be compelled to function (at least in the context of articles concerning candidates for public office) as editors of Florida newspapers. The Florida Supreme Court itself, in its desire to uphold the constitutionality of the statute, was required to interpret and define the meaning thereof in the most torturous fashion. In effect, the Florida Supreme Court began the process of a type of judicial definition of editorial standards which the First Amendment was specifically designed to prevent. Once the task of determining appropriate editorial standards is vested in the courts, or in any other governmental agency, the process of implementing these standards will inevitably decline into a "stop-watch" process where advocates will argue about the fairness of particular words, the propriety of particular lengths of stories, even perhaps the problems of the newspaper distribution process.

The certainty of this process was, we believe, apparent to the gramers of the First Amendment who erected a barrier against this type of governmental regulation by clearly and simply stating that government shall make "no law" abridging freedom of the press. That injunction should be read in the spirit and terms in which it was created and cannot be served by an interpretation which would thrust the government directly into the position of establishing official editorial standards.

The Florida Supreme Court, in upholding the statute, quoted at length this Court's opinion in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1967). However, the Florida Supreme Court pointedly ignored the Court's recognition in *Red Lion* that its decision was compelled by the unique and peculiar circumstances of broadcast media, and should not be given a wider interpretation. The narrowness of exception to First Amendment doctrine carved out by *Red Lion* was made plain by this Court in its later decision in *Columbia Broadcasting System, Inc., supra:*

> "Mr. Justice White's opinion for the Court in Red Lion Broadcasting Co. v. FCC, 395 US 367, 23 L Ed 2d 371, 89 S Ct 1794 (1969), makes clear that the broadcast media pose unique and special problems not present in the traditional free speech case. Unlike other media, broadcasting is subject to an inherent physical limitation. Broadcast frequencies are a scarce resource; they must be portioned out among applicants. All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated."[5]

The holding of *Columbia Broadcasting* emphasizes that the type of compulsory right of reply embodied in the Florida statute would be too much of an imposition of governmental control on editorial judgment even in the case of broadcast media. *A fortiori* it is an impermissible usurpation of editorial freedom in the print media. If the decision of the Florida Supreme Court is upheld, it would mean that the press would be subject to more restrictive

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[5] *Columbia Broadcasting System, Inc.*, 36 L.Ed. 2d at 783.

control than broadcasters, a concept completely at odds with the words and spirit of *Red Lion* and *Columbia Broadcasting System.*

Amici reject the argument that the Florida statute should be upheld on the grounds that it represents a valid exercise of the state's police power in insuring free elections and in allegedly reducing monopoly abuse by the press. This Court has repeatedly pointed out that neither of these grounds can validly support direct imposition of controls on the contents of newspapers.[6] "There is never a paucity of arguments in favor of limiting the freedom of the press."[7] But the claim that the statute would achieve some worthy social goal, despite its admitted limitation of editorial freedom, is one which cannot be accepted by this Court. The Florida compulsory publication statute is no more a legitimate exercise of state police power than it is a constitutionally permissible means to achieve the purposes of the First Amendment.

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[6] See, e.g., *Mills v. Alabama,* 384 U.S. 214 (1966); *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964); *Winters v. New York,* 333 U.S. 507 (1948); *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971).

[7] *Columbia Broadcasting System, Inc.,* 36 L.Ed.2d at 801.

CONCLUSION

For the reasons set forth above, amici respectfully requests that this Court reverse the judgment entered by the Supreme Court of Florida, and further declare that the Florida statute is unconstitutional.

Respectfully submitted

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Attorney for Amici, The American Society of Newspaper Editors, and the Society of Professional Journalists, Sigma Delta Chi

February 28, 1974

CERTIFICATE OF SERVICE

I, Leonard H. Marks, hereby certify that I have this 28th day of February, 1974 sent by postage prepaid first class United States airmail two copies of the foregoing Brief of Amici Curiae, The American Society of Newspaper Editors and The Society of Professional Journalists, Sigma Delta Chi in Support of Appellant to:

Daniel P . S. Paul, Esq.,
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Leonard H. Marks

APPENDIX

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February 12, 1974

Daniel P. S. Paul, Esquire
1300 First National Bank Building
Miami, Florida 33131

In re: *The Miami Herald Publishing Company v. Pat L. Tornillo, Jr.*, U.S. Supreme Court No. 73-797

Dear Mr. Paul

Pursuant to Rule 42 of the Rules of the Supreme Court, the American Society of Newspaper Editors and the Society of Professional Journalists, Sigma Delta Chi, hereby request consent of the Miami Herald Publishing Company to the filing of a brief amici curiae by ASNE and the Society of Professional Journalists, Sigma Delta Chi in the above-referenced case.

Your consent would be appreciated.

Sincerely

/s/ Leonard H. Marks

Consented to: /s/ Daniel P. S. Paul
Attorney for Miami Herald
Publishing Company

Law Offices
COHN AND MARKS
1920 L Street. N.W.
Washington, D.C. 20036

February 12, 1974

Tobias Simon, Esquire
1492 South Miami Avenue
Miami, Flroida 33130

In re: *The Miami Herald Publishing Company v. Pat L. Tornillo, Jr.*, U.S. Supreme Court Case No. 73-797

Dear Mr. Simon

Pursuant to Rule 42 of the Rules of the Supreme Court, the American Society of Newspaper Editors and the Society of Professional Journalists, Sigma Delta Chi, hereby request consent of Pat L. Tornillo, Jr. to the filing of a brief amici curiae by the American Society of Newspaper Editors and the Society of Professional Journalists, Sigma Delta Chi, in the above-referenced case.

Your consent would be appreciated.

Sincerely

/s/ Leonard H. Marks

Consented to: /s/ Tobias Simon
Attorney for Pat L. Tornillo, Jr.

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MIAMI HERALD PUBLISHING CO., DIVISION OF KNIGHT NEWSPAPERS, INC. *v.* TORNILLO

APPEAL FROM THE SUPREME COURT OF FLORIDA

No. 73-797. Argued April 17, 1974—Decided June 25, 1974

After appellant newspaper had refused to print appellee's replies to editorials critical of appellee's candidacy for state office, appellee brought suit in Florida Circuit Court seeking injunctive and declaratory relief and damages, based on Florida's "right of reply" statute that grants a political candidate a right to equal space to answer criticism and attacks on his record by a newspaper, and making it a misdemeanor for the newspaper to fail to comply. The Circuit Court held the statute unconstitutional as infringing on the freedom of the press and dismissed the action. The Florida Supreme Court reversed, holding that the statute did not violate constitutional guarantees, and that civil remedies, including damages, were available, and remanded to the trial court for further proceedings. *Held:*

1. The Florida Supreme Court's judgment is "final" under 28 U. S. C. § 1257, and thus is ripe for review by this Court. *North Dakota Pharmacy Bd.* v. *Snyder's Stores*, 414 U. S. 156. Pp. 4–5.

2. The statute violates the First Amendment's guarantee of a free press. Pp. 5–16.

(a) Governmental compulsion on a newspaper to publish that which "reason" tells it should not be published is unconstitutional. P. 14.

(b) The statute operates as a command by a State in the same sense as a statute or regulation forbidding appellant from publishing specified matter. P. 15.

(c) The statute exacts a penalty on the basis of the content of a newspaper by imposing additional printing, composing, and materials costs and by taking up space that could be devoted to other material the newspaper may have preferred to print. P. 15.

Syllabus

(d) Even if a newspaper would face no additional costs to comply with the statute and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the statute still fails to clear the First Amendment's barriers because of its intrusion into the function of editors in choosing what material goes into a newspaper and in deciding on the size and content of the paper and the treatment of public issues and officials. P. 16.

287 So. 2d 78, reversed.

BURGER, C. J., delivered the opinion for a unanimous Court. BRENNAN, J., filed a concurring statement, in which REHNQUIST, J., joined. WHITE, J., filed a concurring opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73–797

The Miami Herald Publishing Company, A Division of Knight Newspapers, Inc., Appellant, *v.* Pat L. Tornillo, Jr. | On Appeal from the Supreme Court of Florida.

[June 25, 1974]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The issue in this case is whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper, violates the guarantees of a free press.

I

In the fall of 1972, appellee, Executive Director of the Classroom Teachers Association, apparently a teachers' collective-bargaining agent, was a candidate for the Florida House of Representatives. On September 20, 1972, and again on September 29, 1972, appellant printed editorials critical of appellee's candidacy.[1] In

[1] The text of the September 20, 1972, editorial is as follows:

"The State's Laws And Pat Tornillo

"LOOK who's upholding the law!

"Pat Tornillo, boss of the Classroom Teachers Association and candidate for the State Legislature in the Oct. 3 runoff election, has denounced his opponent as lacking 'the knowledge to be a legislator,

response to these editorials appellee demanded that appellant print verbatim his replies, defending the role of the Classroom Teachers Association and the organization's accomplishments for the citizens of Dade County. Appellant declined to print the appellee's replies, and appellee brought suit in Circuit Court, Dade County, seeking declaratory and injunctive relief and actual and punitive damages in excess of $5,000. The action was

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as evidenced by his failure to file a list of contributions to and expenditures of his campaign as required by law.'

"Czar Tornillo calls 'violation of this law inexcusable.'

"This is the same Pat Tornillo who led the CTA strike from February 19 to March 11, 1968, against the school children and taxpayers of Dade County. Call it whatever you will, it was an illegal act against the public interest and clearly prohibited by the statutes.

"We cannot say it would be illegal but certainly it would be inexcusable of the voters if they sent Pat Tornillo to Tallahassee to occupy the seat for District 103 in the House of Representatives."

The text of the September 29, 1972, editorial is as follows:

"FROM the people who brought you this—the teacher strike of '68—come now instructions on how to vote for responsible government, i.e., against Crutcher Harrison and Ethel Beckham, for Pat Tornillo. The tracts and blurbs and bumper stickers pile up daily in teachers' school mailboxes amidst continuing pouts that the School Board should be delivering all this at your expense. The screeds say the strike is not an issue. We say maybe it wouldn't be were it not a part of a continuation of disregard of any and all laws the CTA might find aggravating. Whether in defiance of zoning laws at CTA Towers, contracts and laws during the strike, or more recently state prohibitions against soliciting campaign funds amongst teachers, CTA says fie and try and sue us—what's good for CTA is good for CTA and that is natural law. Tornillo's law, maybe. For years now he has been kicking the public shin to call attention to his shakedown statesmanship. He and whichever acerbic prexy is in alleged office have always felt their private ventures so chock-full of public weal that we should leap at the chance to nab the tab, be it half the Glorious Leader's salary or the dues checkoff or anything else except perhaps mileage on the staff hydrofoil. Give him public office, says Pat, and he will no doubt live by the Golden Rule. Our translation reads that as more gold and more rule."

premised on Florida Statute § 104.38, a "right of reply" statute which provides that if a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges. The reply must appear in as conspicuous a place and in the same kind of type as the charges which prompted the reply, provided it does not take up more space than the charges. Failure to comply with the statute constitutes a first-degree misdeameanor.[2]

Appellant sought a declaration that § 104.38 was unconstitutional. After an emergency hearing requested by appellee, the Circuit Court denied injunctive relief because, absent special circumstances, no injunction could properly issue against the commission of a crime, and held that § 104.38 was unconstitutional as an infringement on the freedom of the press under the First and Fourteenth Amendments to the Constitution. *Tornillo* v. *Miami Herald Publishing Co.*, 38 Fla. Supp. 80 (1972). The Circuit Court concluded that dictating what a newspaper must print was no different from dictating what it must not print. The Circuit Judge viewed the statute's vagueness as serving "to restrict and stifle protected expres-

[2] "104.38 *Newspaper assailing candidate in an election; space for reply*—If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.803."

sion." 38 Fla. Supp., at 83. Appellee's cause was dismissed with prejudice.

On direct appeal, the Florida Supreme Court reversed holding that § 104.38 did not violate constitutional guarantees. *Tornillo* v. *Miami Herald Publishing Co.*, 287 So. 2d 78 (1973).[3] It held that free speech was enhanced and not abridged by the Florida right of reply statute, which in that court's view, furthered the "broad societal interest in the free flow of information to the public." 287 So. 2d, at 82. It also held that the statute was not impermissably vague; the statute informs "those who are subject to it as to what conduct on their part will render them liable to its penalties." 287 So. 2d, at 85.[4] Civil remedies, including damages, were held to be available under this statute; the case was remanded to the trial court for further proceedings not inconsistent with the Florida Supreme Court's opinion.

We postponed consideration of the question of jurisdiction to the hearing of the case on the merits. 414 U. S. 1142 (1974).

II

Although both parties contend that this Court has jurisdiction to review the judgment of the Florida

[3] The Supreme Court did not disturb the Circuit Court's holding that injunctive relief was not proper in this case even if the statute were constitutional. According to the Supreme Court neither side took issue with that part of the Circuit Court's decision. 287 So. 2d, at 85.

[4] The Supreme Court placed the following limiting construction on the statute:

"[W]e hold that the mandate of the statute refers to 'any reply' which is wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane."

287 So. 2d, at 86.

Supreme Court, a suggestion was initially made that the judgment of the Florida Supreme Court might not be "final" under 28 U. S. C. § 1257.[5] In *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U. S. 156 (1973), we reviewed a judgment of the North Dakota Supreme Court, under which the case had been remanded so that further state proceedings could be conducted respecting Snyder's application for a permit to operate a drug store. We held that to be a final judgment for purposes of our jurisdiction. Under the principles of finality enunciated in *Snyder's Drug Stores*, the judgment of the Florida Supreme Court in this case is ripe for review by this Court.[6]

III

A

The challenged statute creates a right to reply to press criticism of a candidate for nomination or election. The statute was enacted in 1913 and this is only the second recorded case decided under its provisions.[7]

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[5] Appellee's Response to Appellant's Jurisdictional Statement and Motion to Affirm the Judgment Below or, in the Alternative, to Dismiss the Appeal, at 4–7.

[6] Both appellant and appellee claim that the uncertainty of the constitutional validity of § 104.38 restricts the present exercise of First Amendment rights. Brief for Appellant, at 41. Brief for Appellee, at 79. Appellant finds urgency for the present consideration of the constitutionality of the statute in the upcoming 1974 elections. Whichever way we were to decide on the merits, it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture of § 104.38 could only further harm the operation of a free press. *Mills* v. *Alabama*, 384 U. S. 214, 221–222 (1966) (DOUGLAS, J., concurring). See also *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, 418 n. (1971).

[7] In its first court test the statute was declared unconstitutional. *State* v. *News-Journal Corp.*, 36 Fla. Supp. 164 (Volusia County J.

Appellant contends the statute is void on its face because it purports to regulate the content of a newspaper in violation of the First Amendment. Alternatively it is urged that the statute is void for vagueness since no editor could know exactly what words would call the statute into operation. It is also contended that the statute fails to distinguish between critical comment which is and is not defamatory.

B

The appellee and supporting advocates of an enforceable right of access to the press vigorously argue that Government has an obligation to ensure that a wide variety of views reach the public.[8] The contentions of access proponents will be set out in some detail.[9] It is urged that at the time the First Amendment to the Constitution [10] was enacted in 1791 as part of our Bill of Rights the press was broadly representative of the people it was serving. While many of the newspapers were intensely partisan and narrow in their views, the press collectively presented a broad range of opinions to readers. Entry into publishing was inexpensive; pamphlets and books provided meaningful alternatives to the

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Ct., Fla. 1972). In neither of the two suits, the instant action and the 1972 action, has the Florida Attorney General defended the statute's constitutionality.

[8] See generally Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967).

[9] For a good overview of the position of access advocates see Lange, The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment, 52 N. Car. L. Rev. 1, 8–9 (1973) (hereinafter "Lange").

[10] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

organized press for the expression of unpopular ideas and often treated events and expressed views not covered by conventional newspapers.[11] A true marketplace of ideas existed in which there was relatively easy access to the channels of communication.

Access advocates submit that although newspapers of the present are superficially similar to those of 1791 the press of today is in reality very different from that known in the early years of our national existence. In the past half century a communications revolution has seen the introduction of radio and television into our lives, the promise of a global community through the use of communications satellites, and the spectre of a "wired" nation by means of an expanding cable television network with two-way capabilities. The printed press, it is said, has not escaped the effects of this revolution. Newspapers have become big business and there are far fewer of them to serve a larger literate population.[12] Chains of newspapers, national newspapers, national wire and news services, and one-newspaper towns,[13] are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events. Major metropolitan

[11] See Commission on Freedom of the Press, A Free and Responsible Press 14 (1947) (hereinafter "Commission").

[12] Commission 15. Even in the last 20 years there has been a significant increase in the number of people likely to read newspapers. Bagdikian, Fat Newspapers and Slim Coverage, Columbia Journalism Review, Sept./Oct. 1973, at 16.

[13] "Nearly half of U. S. daily newspapers, representing some three-fifths of daily and Sunday circulation, are owned by newspaper groups and chains, including diversified business conglomerates. One newspaper towns have become the rule, with effective competition operating in only 4 percent of our large cities." Balk, Background Paper, Twentieth Century Fund Task Force Report for a National News Council, A Free and Responsive Press 18 (1973).

newspapers have collaborated to establish news services national in scope.[14] Such national news organizations provide syndicated "interpretative reporting" as well as syndicated features and commentary, all of which can serve as part of the new school of "advocacy journalism."

The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.

The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion.[15] Much of the editorial opinion and commentary that is printed is that of syndicated columnists distributed nationwide and, as a result, we are told, on national and world issues there tends to be a homogeneity of editorial opinion, commentary, and interpretative analysis. The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires. In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues. The monopoly of the means of communication allows for little or no critical

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[14] Report of the Task Force, Twentieth Century Fund Task Force Report for a National News Council, A Free and Responsive Press 4 (1973).

[15] "Local monopoly in printed news raises serious questions of diversity of information and opinion. What a local newspaper does not print about local affair does not see general print at all. And, having the power to take initiative in reporting and enunciation of opinions, it has extraordinary power to set the atmosphere and determine the terms of local consideration of public issues." B. Bagdikian, The Information Machines 127 (1971).

analysis of the media except in professional journals of very limited readership.

> "This concentration of nationwide news organizations—like other large institutions—has grown increasingly remote from and unresponsive to the popular constituencies on which they depend and which depend on them." Report of the Task Force, The Twentieth Century Fund Task Force Report for a National News Council, A Free and Responsive Press 4 (1973).

Appellees cite the report of the Commission on Freedom of the Press, chaired by Robert M. Hutchins, in which it was stated, as long ago as 1947, that "The right of free public expression has . . . lost its earlier reality." Commission on Freedom of the Press, A Free and Responsible Press 15.

The obvious solution, which was available to dissidents at an earlier time when entry into publishing was relatively inexpensive, today would be to have additional newspapers. But the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers,[16] have made entry into the marketplace of ideas served by the print media almost impossible. It is urged that the claim of newspapers to be "surrogates for the public" carries with it a concomitant fiduciary obligation to account for that stewardship.[17] From this premise

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[16] The newspapers have persuaded Congress to grant them immunity from the antitrust laws in the case of "failing" newspapers for joint operations. 15 U. S. C. § 1801 *et seq.*

[17] "Freedom of the press is a right belonging, like all rights in a democracy, to all the people. As a practical matter, however, it can be exercised only by those who have effective access to the press. Where the financial, economic, and technological conditions limit such access to a small minority, the exercise of that right by that minority takes on fiduciary or quasi-fiduciary characteristics." A. MacLeish in W. Hocking, Freedom of the Press, 99 n. 4 (1947).

it is reasoned that the only effective way to insure fairness and accuracy and to provide for some accountability is for government to take affirmative action. The First Amendment interest of the public in being informed is said to be in peril because the "marketplace of ideas" is today a monopoly controlled by the owners of the market.

Proponents of enforced access to the press take comfort from language in several of this Court's decisions which suggests that the First Amendment acts as a sword as well as a shield, that it imposes obligations on the owners of the press in addition to protecting the press from government regulation. In *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945), the Court, in rejecting the argument that the press is immune from the antitrust laws by virtue of the First Amendment, stated:

> "The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." (Footnote omitted.)

In *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964), the Court spoke of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." It is argued that the "uninhibited, robust" debate is not "wide-open" but open only to a monopoly in control of the press. Appellee cites the plurality opinion in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 47 & n. 15 (1971), which he suggests seemed to invite experimentation by the States in right to access regulation of the press.[18]

Access advocates note that MR. JUSTICE DOUGLAS a decade ago expressed his deep concern regarding the effects of newspaper monopolies:

> "Where one paper has a monopoly in an area, it seldom presents two sides of an issue. It too often hammers away on one ideological or political line

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[18] "If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern.[15] . . .

"[15] Some states have adopted retraction statutes or right-of-reply statutes . . . .

"One writer, in arguing that the First Amendment itself should be read to guarantee a right of access to the media not limited to a right to respond to defamatory falsehoods, has suggested several ways the law might encourage public discussion. Barron, Access to the Press—A New First Amendment right, 80 Harv. L. Rev. 1641, 1666–1678 (1967). It is important to recognize that the private individual often desires press exposure either for himself, his ideas, or his causes. Constitutional adjudication must take into account the individual's interest in access to the press as well as the individual's interest in preserving his reputation, even though libel actions by their nature encourage a narrow view of the individual's interest since they focus only on situations where the individual has been harmed by undesired press attention. A constitutional rule that deters the press from covering the ideas or activities of the private individual thus conceives the individual's interest too narrowly."

> using its monopoly position not to educate people, not to promote debate, but to inculcate its readers with one philosophy, one attitude—and to make money . . . . The newspapers that give a variety of views and news that is not slanted or contrived are few indeed. And the problem promises to get worse. . . . ." The Great Right (Ed. by E. Cahn) 124–125, 127 (1963).

They also claim the qualified support of Professor Thomas I. Emerson, who has written that "[a] limited right of access to the press can be safely enforced," although he believes that "[g]overnment measures to encourage a multiplicity of outlets, rather than compelling a few outlets to represent everybody, seems a preferable course of action." T. Emerson, The System of Freedom of Expression 671 (1970).

IV

However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual.[19] If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that amendment developed over the years.[20]

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[19] The National News Council, an independent and voluntary body concerned with press fairness, was created in 1973 to provide a means for neutral examination of claims of press inaccuracy. The Council was created following the publication of the Twentieth Century Fund's Task Force Report for a National News Council, A Free and Responsive Press. The Background Paper attached to the Report dealt in some detail with the British Press Council, seen by the author of the paper as having the most interest to the United States of the European press councils.

[20] Because we hold that § 104.38 violates the First Amendment's

The Court foresaw the problems relating to government enforced access as early as its decision in *Associated Press* v. *United States, supra.* There it carefully contrasted the private "compulsion to print" called for by the Association's Bylaws with the provisions of the District Court decree against appellants which "does not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published." 326 U. S., at 20 n. 18. In *Branzburg* v. *Hayes,* 408 U. S. 665, 681 (1972), we emphasized that the cases then before us "involve no intrusions upon speech and assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold." In *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U. S. 94, 117 (1973), the plurality opinion noted:

> "The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers."

An attitude strongly adverse to any attempt to extend a right of access to newspapers was echoed by several Members of this Court in their separate opinions in that case. 412 U. S., at 145 (STEWART, J., concurring); 412 U. S., at 182 n. 12 (BRENNAN, J., dissenting). Recently, while approving a bar against employment advertising specifying "male" or "female" preference, the Court's opinion in *Pittsburg Press Co.* v. *Human Relations Com-*

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guarantee of a free press we have no occasion to consider appellant's further argument that the statute is unconstitutionally vague.

mission, 413 U. S. 376, 391 (1973), took pains to limit its holding within narrow bounds:

> "Nor, *a fortiori*, does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial."

Dissenting in *Pittsburgh Press*, MR. JUSTICE STEWART joined by MR. JUSTICE DOUGLAS expressed the view that no "government agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot." *Id.*, at 400. See *Associates & Aldrich Company* v. *Times Mirror Company*, 440 F. 2d 133, 135 (CA9 1971).

We see that beginning with *Associated Press, supra*, the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such a compulsion to publish that which " 'reason' tells them should not be published" is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.

Appellee's argument that the Florida statute does not amount to a restriction of appellant's right to speak because "the statute in question here has not prevented the *Miami Herald* from saying anything it wished" [21] begs the core question. Compelling editors or publishers to publish that which " 'reason' tells them should not be published" is what is at issue in this case. The Florida

[21] Brief for Appellee, at 5.

statute operates as a command in the same sense as a statute or regulation forbidding appellant from publishing specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. *Grosjean* v. *American Press Co.*, 297 U. S. 233, 244–245 (1936). The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. It is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an econmic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.[22]

Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right of access statute, editors might well conclude that the safe course is to avoid con-

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[22] "However, since the amount of space a newspaper can devote to 'live news' is finite,[39] if a newspaper is forced to publish a particular item, it must as a practical matter, omit something else.

"[39] The number of column inches available for news is predetermined by a number of financial and physical factors, including circulation, the amount of advertising, and, increasingly, the availability of newsprint. . . ."

Note, 48 Tulane L. Rev. 433, 438 (1974) (footnote omitted).

Another factor operating against the "solution" of adding more pages to accommodate the access matter is that "increasingly subscribers complain of bulky, unwieldly papers." Bagdikian, Fat Newspapers and Slim Coverage, Columbia Journalism Review, Sept./Oct. 1973, at 19.

troversy and that, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced.[23] Government enforced right of access inescapably "dampens the vigor and limits the variety of public debate," *New York Times Co.* v. *Sullivan, supra,* 376 U. S., at 279. The Court, in *Mills* v. *Alabama,* 384 U. S. 214, 218 (1966), stated that

> "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates. . . ."

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to to forego publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising.[24] The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent

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[23] See the description of the likely effect of the Florida statute on publishers, in Lange, 52 N. C. L. Rev., at 70–71.

[24] "[L]iberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper. A journal does not merely print observed facts the way a cow is photographed through a plate-glass window. As soon as the facts are set in their context, you have interpretation and you have selection, and editorial selection opens the way to editorial suppression. Then how can the state force abstention from discrimination in the news without dictating selection?" 2 Z. Chafee, Government and Mass Communications 633 (1947).

with First Amendment guarantees of a free press as they have evolved to this time. Accordingly, the judgment of the Supreme Court of Florida is reversed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 73–797

The Miami Herald Publishing Company, A Division of Knight Newspapers, Inc., Appellant, *v.* Pat L. Tornillo, Jr.	On Appeal from the Supreme Court of Florida.

[June 25, 1974]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE REHNQUIST joins, concurring.

I join the Court's opinion which, as I understand it, addresses only "right of reply" statutes and implies no view upon the constitutionality of "retraction" statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction. See generally Note, Vindication of the Reputation of a Public Official, 80 Harv. L. Rev. 1730, 1739–1747 (1967).

SUPREME COURT OF THE UNITED STATES

No. 73–797

The Miami Herald Publishing Company, A Division of Knight Newspapers, Inc., Appellant, *v.* Pat L. Tornillo, Jr.

On Appeal from the Supreme Court of Florida.

[June 25, 1974]

MR. JUSTICE WHITE, concurring.

The Court today holds that the First Amendment bars a State from requiring a newspaper to print the reply of a candidate for public office whose personal character has been criticized by that newspaper's editorials. According to our accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned. *New York Times Co.* v. *United States*, 403 U. S. 713 (1971). A newspaper or magazine is not a public utility subject to "reasonable" governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed. Cf. *Mills* v. *Alabama*, 384 U. S. 214, 220 (1966). We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficient-sounding the purposes of controlling the press might be, we prefer "the power of reason as applied through public

discussion" [1] and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.

> "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials selected by the people responsible to all the people whom they were elected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor or contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free." *Mills* v. *Alabama*, *supra*, at 218–219.

Of course, the press is not always accurate, or even responsible, and may not present full and fair debate on important public issues. But the balance struck by the First Amendment with respect to the press is that society must take the risk that occasionally debate on vital matters will not be comprehensive and that all

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[1] *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (Brandeis, J., concurring).

viewpoints may not be expressed. The press would be unlicensed because, in Jefferson's words, "[w]here the press is free, and every man able to read, all is safe." [2] Any other accommodation—any other system that would supplant private control of the press with the heavy hand of government intrusion—would make the government the censor of what the people may read and know.

To justify this statute, Florida advances a concedely important interest of ensuring free and fair elections by means of an electorate informed about the issues. But prior compulsion by government in mattters going to the very nerve center of a newspaper—the decision as to what copy will or will not be included in any given edition—collides with the First Amendment. Woven into the fabric of the First Amendment is the unexceptionable, but nonetheless timeless, sentiment that "liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper." 2 Z. Chafee, Jr., Government and Mass Communications 633 (1947).

The constitutionally obnoxious feature of § 104.38 is not that the Florida legislature may also have placed a high premium on the protection of individual reputational interests; for, government certainly has "a pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt* v. *Baer*, 383 U. S. 75, 86 (1966). Quite the contrary, this law runs afoul of the elementary First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor. Whatever power may reside in government to influence the publishing of certain narrowly circumscribed categories of material, see, *e. g.*,

[2] Letter to Col. Charles Yancey, in XIV The Writings of Thomas Jefferson 384 (Lipscomb ed. 1904).

Pittsburgh Press Co. v. *Pittsburgh Commission on Human Relations*, 413 U. S. 376 (1973); *New York Times Co.* v. *United States*, *supra*, at 730 (concurring opinion), we have never thought that the First Amendment permitted public officials to dictate to the press the contents of its news columns or the slant of its editorials.

But though a newspaper may publish without government censorship, it has never been entirely free from liability for what it chooses to print. See *New York Times Co.* v. *United States*, *supra*, at 730 (concurring opinion). Among other things, the press has not been wholly at liberty to publish falsehoods damaging to individual reputation. At least until today, we have cherished the average citizen's reputation interest enough to afford him a fair chance to vindicate himself in an action for libel characteristically provided by state law. He has been unable to force the press to tell his side of the story or to print a retraction, but he has had at least the opportunity to win a judgment if he can prove the falsity of the damaging publication, as well as a fair chance to recover reasonable damages for his injury.

Reaffirming the rule that the press cannot be forced to print an answer to a personal attack made by it, however, throws into stark relief the consequences of the new balance forged by the Court in the companion case also announced today. *Gertz* v. *Robert Welch, Inc.*, *ante*, goes far towards eviscerating the effectiveness of the ordinary libel action, which has long been the only potent response available to the private citizen libeled by the press. Under *Gertz*, the burden of proving liability is immeasurably increased, proving damages is made exceedingly more difficult, and vindicating reputation by merely proving falsehood and winning a judgment to that effect are wholly foreclosed. Needlessly, in my view, the Court trivializes and denigrates the

interest in reputation by removing virtually all the protection the law has always afforded.

Of course, these two decisions do not mean that because government may not dictate what the press is to print, neither can it afford a remedy for libel in any form. *Gertz* itself leaves a putative remedy for libel intact, albeit in severely emaciated form; and the press certainly remains liable for knowing or reckless falsehoods under *New York Times* and its progeny, however improper an injunction against publication might be.

One need not think less of the First Amendment to sustain reasonable methods for allowing the average citizen to redeem a falsely tarnished reputation. Nor does one have to doubt the genuine decency, integrity and good sense of the vast majority of professional journalists to support the right of any individual to have his day in court when he has been falsely maligned in the public press. The press is the servant, not the master, of the citizenry, and its freedom does not carry with it an unrestricted hunting license to prey on the ordinary citizen.

> "In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise. . . .
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> ". . . Without . . . a lively sense of responsibility a free press may readily become a powerful instrument of injustice." *Pennekamp* v. *Florida*, 328 U. S. 331, 356, 365 (1946) (Frankfurter, J., concurring) (footnote omitted).

To me it is a near absurdity to so deprecate individual dignity, as the Court does in *Gertz*, and to leave the people at the complete mercy of the press, at least in this stage of our history when the press, as the majority in this case so well documents, is steadily becoming more powerful and much less likely to be deterred by threats of libel suits.